Supreme Court, U.S.
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No. '99 271

In the

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF NIAGARA FALLS, NEW YORK,
LAUREL SHEEHAN and THOMAS ZWELLING,

Petitioners,

vs.

BARBARA CAPTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an action under 42 U.S.C. § 1983 in which the plaintiff alleges that a municipal police officer's use of excessive force was occasioned by the municipality's custom, policy or practice of deliberate indifference to the constitutional right to be free from such force, may the municipality be held liable even though plaintiff fails to prove even one prior instance where a person's civil rights had been violated by a member of the police department?

2. Where the District Court in a § 1983 action instructs the jury that a municipal police chief could be subject to punitive damages only if he acted with "malicious intent to violate [the plaintiff's] rights, or with a callous or reckless disregard of [the plaintiff's] rights," can the award of punitive damages be sustained notwithstanding the absence of proof of any such animus based upon the theory that proof of a general "deliberate indifference" to constitutional violations necessarily establishes the heightened "callous or reckless disregard" standard that was incorporated into the jury charge?

PARTIES TO THE PROCEEDING

Petitioners

The City of Niagara Falls, New York, its former Chief of Police, Thomas Zwelling, and City of Niagara Falls Police Officer Laurel Sheehan.

Respondent

Barbara Capton.

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OPINIONS BELOW

The full Summary Order of the United States Court of Appeals for the Second Circuit is not reported in the Federal Reporter. It can, however, be found at 1999 U.S. App. LEXIS 3484 (2d Cir. March 4, 1999). It is reported in table form at 175 F.3d 1007 (2d Cir. 1999). The Summary Order is included in the Appendix at A-1 to A-5. The District Court's Decision and Order dated December 5, 1997, and entered December 8, 1997, which adjudicated petitioners' post-trial motions ("Post-Trial Decision and Order"), is included in the Appendix at A-6 to A-31. It is not reported.

The District Court's Decision and Order dated January 13, 1997 (*nunc pro tunc*), and entered February 12, 1997, which adjudicated various pretrial issues ("Pretrial Decision and Order"), is included in the Appendix at A-32 to A-41. It is not reported.

The District Court's Decision and Order dated January 8, 1997, and entered January 9, 1997, which adjudicated petitioners' pretrial motion to trifurcate ("Trifurcation Decision and Order"), is included in the Appendix at A-42 to A-49. It, too, is not reported.

The District Court's Second Amended Judgment, entered February 14, 1997, which was the final judgment prior to the remand from the Second Circuit, is included in the Appendix at A-78.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its Summary Order on March 4, 1999. The Court of Appeals denied a timely Petition for Rehearing and for Rehearing *En Banc* by Order filed May 19, 1999 (A-50).[1] This Petition for Writ of Certiorari is filed within ninety days of the denial of the Petition for Rehearing. The Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

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[1] The Court of Appeals' order mistakenly indicates that the Petition for Panel Rehearing and Rehearing *En Banc* was filed by respondent Barbara Capton (A-50). In fact, it was filed by the City of Niagara Falls, New York, Laurel Sheehan and Thomas Zwelling, all of whom are petitioners before this Court, as well.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . .

Title 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

This civil action, in which respondent Barbara Capton asserted claims under 42 U.S.C. § 1983, was tried before a jury in the United States District Court for the Western District of New York (Skretny, District Judge) in January and February, 1997. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

The jury found that petitioner Laurel Sheehan, a police officer employed by petitioner City of Niagara Falls, New York ("City"), had used excessive force in restraining respondent while she was being booked, thereby proximately causing injuries to her (Verdict Sheet, A-71, ¶ 1). It further found that Mrs. Capton's injuries were proximately caused by the City's and its police chief's (petitioner Thomas Zwelling) custom, policy or practice of deliberate indifference to the police department's civil rights violations (Verdict Sheet, A-72 to 74, ¶¶ 3-5).

The jury awarded compensatory damages in the sum of $1,000,000 against the City alone (Verdict Sheet, A-74 to A-75, ¶¶ 6-6(a)). It awarded punitive damages against Laurel Sheehan and Thomas Zwelling in the sum of $50,000 each (Verdict Sheet, A-75 to A-76, ¶¶ 7-7(a)). The punitive damages award against Chief Zwelling was then set aside by the District Court on petitioners' post-trial motion (Post-Trial Decision and Order, A-27 to A-28).

Petitioners timely appealed the District Court's judgment to the United States Court of Appeals for the Second Circuit, which had jurisdiction pursuant to Fed. R. App. Pro. 4(a)(4) and 28 U.S.C. § 1291. Respondent cross-appealed from so much of the post-trial order as set aside the award of punitive damages against Thomas Zwelling. The Second Circuit vacated so much of the judgment as had set aside the award of $50,000 in punitive damages against Thomas Zwelling, and remanded the case for reinstatement of that award. It affirmed the District Court's judgment and Post-Trial

Decision and Order in all other respects. (Summary Order, A-1 to A-5.)

A. THE COURT OF APPEALS, BY AFFIRMING THE JUDGMENT AGAINST THE CITY, ENDORSED THE DISTRICT COURT'S HOLDING THAT RESPONDENT COULD ESTABLISH THE CITY'S "DELIBERATE INDIFFERENCE" TO CIVIL RIGHTS VIOLATIONS WITHOUT PROVING THAT ANY SUCH VIOLATION HAD EVER OCCURRED.

The District Court, during the course of the trial, ruled that respondent could establish the City's "deliberate indifference" to police misconduct without proving that any prior police misconduct had ever occurred (Trial Ruling, A-63 to A-65; Pretrial Decision and Order, A-35 to A-37). It adopted this approach in conjunction with its denial of petitioners' motion to trifurcate the trial (Trifurcation Decision and Order, A-43 to A-48; Pretrial Decision and Order, A-35 to A-37). Petitioners moved for trifurcation to avoid potentially undue prejudice to the individual defendants in the event respondent, in attempting to establish her "deliberate indifference" claim, introduced proof of prior police misconduct by any named defendant. (Motion to Trifurcate, A-51 to A-52; Memorandum of Law in Support of Motion to Trifurcate, A-53 to A-55.) They moved contemporaneously to limit (but not exclude) the potential proof as to prior deprivations of rights by City police officers (Motion in Limine and Supporting Affirmation, A-56 to A-62).

In so moving, the City stresses, it did not seek to entirely exclude proof of past instances of civil rights violations in support of respondent's "deliberate indifference" claim. Rather, it sought only to limit such proof to incidents that (1) occurred within two years of the incident involving respondent, and (2) involved the use of force while the

complainant was in police custody (Motion in Limine and Supporting Affirmation, A-57, ¶¶ "M" and "N"; A-62, ¶¶ 9-10). Thus, petitioners actively sought to frame the trial so the claim against Laurel Sheehan would not involve proof of actual prior civil rights violations by any officers, but the claim against the City would involve such proof (Memorandum of Law in Support of Motion to Trifurcate, A-53 to A-54).

The District Court, in holding that respondent could establish the City's "deliberate indifference" to police misconduct without proving actual prior instances of such conduct, relied upon the Second Circuit's reasoning in *Fiacco v. City of Rensselaer*, 783 F.2d 319 (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987) (Trial Ruling, A-64; Pretrial Decision and Order, A-36 to A-37). The Court of Appeals in *Fiacco* held that unsubstantiated claims of excess force were *admissible* in a § 1983 action. 783 F.2d at 328. Significantly, the plaintiff in *Fiacco* supported her "deliberate indifference" claim with testimony by numerous witnesses who described particular acts of misconduct in the months preceding plaintiff's assault. 783 F.2d at 329-330.

In accordance with the District Court's ruling in the present case, Barbara Capton did not introduce evidence that any person had ever been injured due to the application of excess force by a member of the Niagara Falls Police Department. Rather, she submitted only a number of written complaints and notices of claim alleging excess force. The claims and complaints had been redacted to delete identifying data (Trifurcation Decision and Order, A-45). The District Court, in its charge, then expressly told the jurors they were neither to assume nor attempt to assess the truth of the various allegations (Jury Charge, A-69 to A-70).

The City and Chief Zwelling moved for a directed verdict during trial pursuant to Fed. R. Civ. Pro. 50(a) based upon respondent's failure to interpose any "testimony during the trial concerning any use of force" by the Niagara Falls police prior to the incident involved in this case (Trial Motion, A-66

to A-68). This argument was then reiterated in the City and Chief Zwelling's post-trial motion pursuant to Fed. R. Civ. Pro. 50(b) and 59 (Affirmation, A-81 to A-82, ¶¶ 2-3, 6; Post-Trial Memorandum of Law, A-83 to A-89). Specifically, the City argued that respondent could prevail only if she proved the actual occurrence of prior constitutional violations involving excess force, and did not meet her burden by simply introducing into evidence complaints and notices of claim alleging the use of such force. (Post-Trial Memorandum of Law, A-83, "Issues Presented"; A-84, A-88 to A-89.) The District Court, in its Post-Trial Decision and Order, did not squarely address this critical issue in adjudicating defendants' post-trial motions (Post-Trial Decision and Order, A-19 to A-20; A-22 to A-24). Rather, it merely noted that the jury could have reasonably found that Mrs. Capton established her claim under *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), based upon proof as to the ostensible inadequacy of the City's investigation of the earlier misconduct claims (Post-Trial Decision and Order, A-22 to A-24).

The Second Circuit affirmed the District Court's judgment insofar as appealed from by petitioners "for substantially the reasons stated in the District Court's thorough post-verdict Decision and Order." (Summary Order, A-3.) The Court of Appeals did not address the fundamental constitutional issue raised in petitioners' trial and post-trial motions for judgment and in their ensuing appeal, i.e.: Was respondent's case fatally deficient because she failed to establish the existence of any actual prior instances of police misconduct involving the use of excessive force?

B. THE COURT OF APPEALS, IN REINSTATING THE PUNITIVE DAMAGES AWARD AGAINST POLICE CHIEF ZWELLING, IMPROPERLY ERASED THE DISTINCTION BETWEEN THE DIFFERENT STANDARDS OF MISCONDUCT NEEDED TO ESTABLISH LIABILITY FOR COMPENSATORY AND PUNITIVE DAMAGES IN ACTIONS UNDER 42 U.S.C. § 1983.

The verdict sheet contained a series of interrogatories addressing petitioners' liability for compensatory and punitive damages (Verdict Sheet, A-71 to A-77). In the portion of the interrogatories directed to the compensatory damages issue, the jury was asked whether Chief Zwelling was "deliberately indifferent to the constitutional right to be free from excessive force because of the Police Chief's failure to carry out his duty to oversee defendant Laurel Sheehan" (Verdict Sheet, A-72, ¶ 4). The jury answered "yes," but went on to award no actual damages against Chief Zwelling (Verdict Sheet, A-74 to A-75, ¶¶ 6 & 6(a)).

In the subsequent and wholly separate question dealing with punitive damages, the jury was asked whether Barbara Capton had proved "by a preponderance of the evidence that [Laurel Sheehan or Chief Zwelling] acted with malicious intent to violate Barbara Capton's rights or with a callous or reckless disregard of Barbara Capton's rights" (Verdict Sheet, A-75 to A-76, ¶ 7). The jury answered "yes" as to each of the defendants (*id.*).

The District Court, in adjudicating petitioners' post-trial motion, held that although Chief Zwelling may have been "deliberately indifferent" to his officers' ability to properly handle situations such as the one confronted by Laurel Sheehan, the "overwhelming evidence" supported the conclusion that Chief Zwelling nevertheless lacked the "malicious intent" or "callous or reckless disregard" of

respondent's rights needed to support a punitive damages award (Post-Trial Decision and Order, A-27 to A-28).

The Second Circuit reinstated the award of $50,000 in punitive damages against Chief Zwelling. The court held that the "deliberate indifference" which the jury found to exist was co-extensive with "callous disregard." (Summary Order, A-4.) Thus, the court implicitly held, it could not be logically said that "deliberate indifference" was present while the requisite "callous disregard" was lacking. (*Id.*) Under this analysis, the court evidently concluded, Mrs. Capton was not obligated to prove that Chief Zwelling had a negative animus towards her personally, notwithstanding the express language of the jury instruction (Verdict Sheet, A-75 to A-76, ¶ 7).

REASONS FOR GRANTING THE WRIT

POINT I

THE COURT OF APPEALS VIOLATED SUPREME COURT PRECEDENT BY PERMITTING RESPONDENT TO PREVAIL BASED UPON THE CITY'S "DELIBERATE INDIFFERENCE" TO CONSTITUTIONAL VIOLATIONS, EVEN THOUGH SHE DID NOT PROVE ANY SUCH VIOLATIONS HAD EVER OCCURRED

The lower courts' holding — that a § 1983 plaintiff may prevail on a claim based upon a municipality's "deliberate indifference" to constitutional violations in the absence of any proven instances of prior unconstitutional conduct by the municipality's employees — conflicts with this Court's controlling precedents, including *Board of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997), *reh. denied*, 520 U.S. 1283 (1997); *City of Canton v. Harris*, 489 U.S. 378 (1989); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (plurality opinion); and *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978).

In *Monell*, the Court held that a local government could be found liable under § 1983 only if its employees, in inflicting injury, were carrying out a governmental policy or custom. 436 U.S. at 694. In addressing the subject of municipal liability for police misconduct, the Court in *Brown* said that under *Monell* a municipality is not liable unless its "*deliberate* action [was] the 'moving force' behind the plaintiff's deprivation of federal rights." *Brown*, 520 U.S. at 400. Where the plaintiff seeks to impose liability based upon an employee's conduct, the Court in *Brown* stressed, "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." 520 U.S. at 405 (citing, *inter alia*, *City of Canton v. Harris*, 489 U.S. at 391-392).

The *Brown* Court, in addressing the imposition of liability based upon a municipality's "deliberate indifference" to the known or obvious consequences of a policy or custom, explained that "'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." 520 U.S. at 410. The Court further held that, to be liable, the municipality must be deliberately indifferent as to a "particular" constitutional violation, the future occurrence of which is "plainly obvious." 520 U.S. at 411. As the dissent noted, the Court in *Brown* enunciated "a new standard" in so holding. *Brown*, 520 U.S. at 422 (Souter, J., dissenting).

In applying this new standard, the five-Justice majority recognized that, with one narrow exception, the municipal practice at issue must have previously resulted in *actual, identifiable* constitutional violations before it can serve as a basis for liability. Thus, in discussing the imposition of liability based upon a city's inadequate training, the Court said:

> If a [police training] program *does not prevent constitutional violations*, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued *adherence to an approach that they know or should know has failed to prevent tortious conduct* by employees may establish the conscious disregard for the consequences of their action — the "deliberate indifference" — necessary to trigger municipal liability.

520 U.S. at 407 (emphasis supplied) (citing *City of Canton v. Harris*, 489 U.S. at 390, n. 10).

Similarly, in holding that a single decision by a municipal policymaker will rarely if ever support a finding of liability, the Court in *Brown* said:

> Because the decision necessarily governs a single case, there can be *no notice to the municipal decisionmaker, based on previous violations of federally protected rights*, that his approach is inadequate. Nor will it be readily apparent that the municipality's action caused the injury in question, because the *plaintiff can point to no other incident* tending to make it more likely that the plaintiff's own injury flows from the municipality's action, rather than from some other intervening cause.

520 U.S. at 408-409 (emphasis supplied).

As it did in *City of Canton v. Harris*, 489 U.S. at 390, and n. 10, the Court in *Brown* posited that "in a narrow range of circumstances" the violation of a federal right could be so predictably and obviously a consequence of a "*glaring omission in a training regimen*" that § 1983 liability could ensue even in the absence of "a pattern of constitutional violations." 520 U.S. at 409 (emphasis supplied). *See also City of Canton*, 489 U.S. at 390 n. 10 (utter failure to conduct firearms training presents patent and predictable risk that injury will occur).

Thus, this Court has squarely held that *unless an egregious failure to train* is at issue, under § 1983 a custom evincing deliberate indifference must have *in fact* resulted in prior specific constitutional violations before a city may be held liable.[2] *See Stemler v. City of Florence*, 126 F.3d 856, 865-866 (6th Cir. 1997) (holding, under *Brown*, that "a plaintiff ordinarily cannot show that a municipality acted with deliberate indifference without showing that 'the municipality was aware of prior unconstitutional actions of

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[2] In the present case, respondent withdrew her claim based on failure to train. Thus, the potential exception identified in *Brown* and *City of Canton* was not at issue in this action.

its employees and failed to respond"), *cert. denied*, 118 S. Ct. 1796 (1998); *see also Oklahoma City v. Tuttle*, 471 U.S. at 823-824 ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability . . . unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy . . . . [W]here the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality and the causal connection between the 'policy' and the constitutional deprivation.") (footnotes omitted).

By affirming the judgment against the City, the Second Circuit disregarded this Court's authoritative and unequivocal holdings. If the Court of Appeals' order is not reversed, and the District Court's judgment vacated in relevant part, the City will be obligated to pay $1,000,000 in damages notwithstanding the absence of any evidence a municipal police officer had previously violated a person's civil rights. The wholesale absence of such proof precludes, as a matter of law, a finding of "deliberate indifference" to civil rights deprivations under *Brown* and the other cases cited above. A Writ of Certiorari should therefore be granted so the Supreme Court may address and reaffirm the critical principles governing municipal liability under 42 U.S.C. § 1983.

POINT II

THE COURT OF APPEALS, IN REINSTATING THE AWARD OF PUNITIVE DAMAGES AGAINST POLICE CHIEF ZWELLING, DISREGARDED THE RESPONDENT'S FAILURE TO SATISFY THE EVIDENTIARY BURDEN IMPOSED BY BOTH THE RELEVANT JURY INSTRUCTION AND THIS COURT'S PRECEDENT

In *Smith v. Wade*, 461 U.S. 30 (1983), this Court held that punitive damages may be awarded in a § 1983 action based on the same proof supporting compensatory damages *if* the claim for compensatory damages requires proof of evil intent or reckless or callous indifference to the rights of others. 461 U.S. at 51-56. *Smith v. Wade* involved an action by a prisoner against a corrections officer; the District Court charged the jury that defendant could be found liable for both compensatory and punitive damages based on the same evidentiary standard, i.e., proof of "a reckless or callous disregard of, or indifference to, the rights or safety of others . . . ." 461 U.S. at 33 (italics omitted).

In the present case, by contrast, the jury was given two distinct standards for imposing liability on Chief Zwelling: Liability for compensatory damages required proof of "deliberate indifference" to the general constitutional right to be free from excess force (Verdict Sheet, A-72 to A-73, ¶ 4); and liability for punitive damages required proof of Chief Zwelling's "malicious intent to violate Barbara Capton's rights or . . . a callous or reckless disregard of Barbara Capton's rights" (Verdict Sheet, A-75 to A-76, ¶ 7).

Although the jury found that respondent had proved her entitlement to punitive damages, the District Court concluded that this finding was unsupported by the evidence (which established that Chief Zwelling had no personal involvement in the arrest or detention of Mrs. Capton) (Post-Trial Decision and Order, A-27 to A-28). In setting aside the award

of punitive damages against Thomas Zwelling, the District Court recognized that the rather abstract conduct qualifying as "deliberate indifference" is less blameworthy and culpable than the harsher conduct constituting "callous or reckless disregard." (Post-Trial Decision and Order, A-28.) It further concluded that although Chief Zwelling may have been deliberately indifferent to his officers' ability to properly handle situations such as the one confronted by Laurel Sheehan (thus establishing respondent's right to compensatory damages), the "overwhelming evidence" supported the conclusion that Chief Zwelling nevertheless lacked the "malicious intent" or "callous or reckless disregard" of respondent's rights needed to support a punitive damages award (Post-Trial Decision and Order, A-28).

In vacating so much of the judgment as embodied this reasoning, the Court of Appeals held that the "deliberate indifference" which the jury found to exist was co-extensive with "callous disregard." (Summary Order, A-4.) Thus, the Second Circuit implicitly held, it could not be logically said that "deliberate indifference" was present while the requisite "callous disregard" was lacking. (*Id.*)

The Court of Appeals, in so collapsing the discrete standards of conduct implicated in the awards of compensatory and punitive damages, violated the principle underlying *Smith v. Wade*, under which exemplary damages are available only upon proof of "evil motive or intent" or "reckless or callous indifference to the federally protected rights of others." 461 U.S. at 56. The Second Circuit's reasoning is especially objectionable because it ignored the jury instruction's requirement that such heightened wrongful conduct be particularly directed at respondent Barbara Capton (Verdict Sheet, A-75 to A-76, ¶ 7). *See generally Smith v. Wade*, 461 U.S. at 86-87 (Rehnquist, J., dissenting) ("penal consequences generally ought to be imposed only where there has been some sort of wrongful *animus* creating the type of liability warranting this treatment"). Indeed, at least one circuit has held that a police chief cannot be held liable for even compensatory damages absent proof he or she

"encouraged the specific incident of misconduct or in some other way directly participated in it." *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 904 (6th Cir. 1998) (citation and internal quotation marks omitted).

Therefore, a Writ of Certiorari should issue so this Court may address the standards for imposing punitive damages under 42 U.S.C. § 1983, especially in the context of excess force claims involving supervisory officers with no direct involvement in the operative acts.

CONCLUSION

This case squarely presents two issues of exceptional importance to the proper adjudication of claims under 42 U.S.C. § 1983. If the Second Circuit's order is allowed to stand, the City of Niagara Falls will be forced to pay $1,000,000 in damages for its ostensible deliberate indifference to past civil rights violations that were never shown to have existed. Former Police Chief Thomas Zwelling will, moreover, be liable for $50,000 in punitive damages based on the Court of Appeals' improvident election to treat as identical the discrete standards governing compensatory and punitive damages in § 1983 actions.

Petitioners respectfully request that their petition for a Writ of Certiorari be granted so this Court can both remedy the Court of Appeals' failure to apply the controlling principles, and reaffirm those principles for the benefit of future courts and litigants.

Dated: Buffalo, New York
August 13, 1999

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 2nd day of March one thousand nine hundred and ninety-nine.

PRESENT: Jose´ A. Cabranes,
Chester J. Straub,
Circuit Judges,
Neal P. McCurn,
District Judge.*

United States Court
of Appeals
Filed
March 2, 1999
Carolyn Clark
Campbell, Clerk
Second Circuit

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* Of the United States District Court for the Northern District of New York, sitting by designation.

BARBARA CAPTON,

Plaintiff-Appellee-Cross-Appellant,

DR. WILLOW WOODWARD,

Plaintiff,

-v-

Nos. 98-7018, 98-7072

CITY OF NIAGRA FALLS, NEW YORK, LAUREL SHEEHAN, and THOMAS ZWELLING,

Defendants-Appellants-Cross-Appellees,

NIAGARA FALLS POLICE DEPARTMENT,

Defendant.

APPEARING FOR APPELLANTS-CROSS-APPELLEES:

JOSEPH M. LATONA, JOHN A. COLLINS, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP, Buffalo, NY.

APPEARING FOR APPELLEE-CROSS-APPELLANT:

GEORGE W. COLLINS, JR., Bouvier, O'Connor, Buffalo, NY.

Appeal from the United States District Court for the Western District of New York (William M. Skretny, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED in part, VACATED in part, and REMANDED.

The defendants in this case — the City of Niagara Falls, Officer Laurel Sheehan, and Chief of Police Thomas Zwelling-appeal from a judgment of the district court, entered following a jury verdict in favor of plaintiff Barbara Capton. Defendants contend that the district court erred (1) in failing to respond to a jury note requesting clarification of the term "negligence" as used in the instructions, (2) in giving an *Allen* charge when the jury was temporarily deadlocked, and (3) in failing to grant defendants' motion for judgment as a – matter of law, pursuant to Fed. R. Civ. P. 50(a). Plaintiff cross-appeals, arguing that the district court erred in vacating the portion of the jury's $1,100,000 damages award that imposed punitive damages (in the amount of $50,000) upon defendant Zwelling.

As to defendants' appeal, we affirm for substantially the reasons stated in the district court's thorough post-verdict Decision and Order. *See Capton v. City of Niagara Falls*, No. 95-CV-149S (W.D.N.Y. December 5, 1997), *reprinted in* Joint Appendix at 2310-37. Defendants raise on appeal at least one contention apparently not addressed by the district court–namely, that plaintiff did not carry her burden of proving the inadequacy of the City's practices for investigating complaints of excessive force. Although the evidence at trial, construed in the light most favorable to plaintiff, indicated that the Police Department failed to investigate numerous complaints (in particular, most complaints filed by means of a Notice of Claim), defendants point out (1) that the evidence also showed that another department of City government — the Corporation Counsel's office — did conduct at least some investigation into these complaints, and (2) that plaintiffs failed to demonstrate that the Corporation Counsel's investigation was inadequate. We do not reach the merits of this argument, because defendants did not preserve it for our review. Although the record

discloses that defendants moved for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(a), after the close of all the evidence, defendants did not then specify this arguable deficiency in plaintiff's proof. Rule 50(a) requires the moving party to make its motion prior to the submission of the case to the jury and to "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Fed. R. Civ. P. 50(a)(2). The movant "must at least identify the specific element that the defendant contends is insufficiently supported" in order to allow "the responding party [to] seek to correct any overlooked deficiencies in the proof." *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 286 (2d Cir. 1998) (citation and internal quotation marks omitted).

On her cross-appeal, plaintiff argues that the district court erred in vacating the punitive damages that the jury had awarded against Zwelling. We agree. Punitive damages are permitted in actions that, like the present, are filed under 42 U.S.C. §1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or *callous indifference* to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983) (emphasis added). The jury found that Zwelling had been "deliberately indifferent to the constitutional right to be free from excessive force," and we have found no reason to upset that finding. Neither the district court's decision nor the defendants' briefs on appeal have offered a convincing rationale for concluding that the "deliberate indifferen[ce]" found by the jury somehow falls short of the "callous indifference" that would justify a punitive damages award.

Defendants' principal response is that the evidence at trial failed to show any personal involvement by Zwelling in the violation of Capton's rights, and that such personal involvement is required by our decision in *Meriwether v. Coughlin*, 879 F.2d 1037 (2d Cir. 1989), for assessing punitive damages against supervisory officials under § 1983. *Meriwether* does not so hold. The district court in that case had vacated a large punitive damages award ($750,000 in

punitive damages, compared to only $5,525 in compensatory damages) because "the award shocked the judicial conscience, and would neither punish outrageous conduct nor deter similar behavior." *Id.* (citations omitted). Although the panel briefly summarized the criteria for awarding punitive damages in such cases, it affirmed apparently due to its agreement with the district court that punitive damages *under the circumstances* would 'shock the conscience." The panel concluded-in language that the instant defendants seize upon-that "considering the defendants' lack of personal involvement in the beatings and the lack of evidence that they acted with evil motive or intent, we agree that the award may not stand." *Id.* Nothing in the relevant passage from *Meriwether* indicates an intent by the panel to impose a *per se* requirement that punitive damages be available against supervisors only when they were personally involved.

For the foregoing reasons, we AFFIRM the judgment of the district court as to defendants' appeal (No. 98-7018), VACATE the judgment as to plaintiff's cross-appeal (No. 98-7072), and REMAND for the reinstatement of the punitive damages award.

For the Court,
Carolyn Clark Campbell, Clerk

By: /s/ Lucille Carr

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON and
DR. WILLOW WOODWARD,

Plaintiffs,

v.

CITY OF NIAGARA FALLS, NEW YORK, NIAGARA FALLS POLICE DEPARTMENT, LAUREL SHEEHAN, and THOMAS ZWELLING,

Defendants.

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95-CV-149S

DECISION AND ORDER

William M. Skretny
District Judge

INTRODUCTION

Defendants' motions for post-verdict relief and Plaintiff's motion for attorney's fees and costs are before this Court. Trial began in Plaintiff's excessive force claim against the Defendants on the morning of January 14, 1997, and the jury returned its verdict on February 7, 1997. The verdict awarded Plaintiff Barbara Capton $1 million in compensatory damages against Defendant City of Niagara Falls ("City" or "Niagara Falls") and $50,000 each in punitive damages against Defendants Sheehan and Zwelling.

Defendants have moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50[1] or, in the alternative, for a new trial pursuant to Rule 59. In support of their motion, the City and Zwelling filed an affirmation with an exhibit ("Maloney Aff." and "Ex. A"), a reply affirmation, and a reply memorandum of law. Sheehan filed an affirmation in support with three exhibits, and a memorandum of law in support of her motion. Plaintiff opposed Defendants' motions with an affidavit with five exhibits ("Collins Aff." and "Ex. A-E"), and with a memorandum of law. This Court heard oral argument on Defendants' motions for post-verdict relief on May 5, 1997.[2]

Plaintiff Capton has moved for attorney's fees and costs pursuant to 42 U.S.C. § 1988. She filed supporting documents which included an affidavit with exhibits attached, a "responding affidavit," and a supplemental affidavit. Defendants Niagara Falls and Zwelling responded to Plaintiff's motion with two separately submitted affirmations. Defendant Sheehan filed a responding affidavit in response to Capton's motion. This Court heard oral argument on Plaintiff's motion for attorney's fees and costs on May 28, 1997.

This Court will grant Defendant Zwelling's motion for judgment as a matter of law on the issue of punitive damages, but will deny the remainder of the Defendants' motions, for the reasons stated in the discussion to follow. This Court will also grant Plaintiff's motion for attorney's fees and costs, at

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[1] Defendants made motions for judgment as a matter of low at trial, and this Court reserved decision on the motion made by the City and by Zwelling. This Court denied Defendant Sheehan's motion.

[2] Defendants moved to seal their post-verdict motions, and Plaintiff indicated at oral argument on the Defendants' motions that she was not opposed to sealing the motion papers. This Court will grant Defendants' motions to seal.

an amount to be determined following a conference with the parties.[3]

BACKGROUND

Plaintiff Capton's Complaint alleges that the Defendants are responsible for injuries Capton has suffered as a result of the use of excessive force by Defendant Sheehan against Capton on August 18, 1994, when Capton was in the arrestive custody of the Niagara Falls Police Department. Capton filed her action seeking relief pursuant to 42 U.S.C. § 1983.[4]

The trial in this action lasted for almost three weeks. The jurors deliberated for four days before returning their verdict. Shortly before the verdict was returned, this Court received a note from the jurors in which they stated, "we are still at an impass [sic], which leaves us at a hung jury. . . . At this time we are requesting to be released from our duty as jurors." (Note #10 from the jury, filed on Feb. 17, 1997.) This Court then, over the objection of defense counsel, gave a supplemental charge to the jury, which included the instruction that:

> your verdict must reflect the conscientious judgment of each juror, and under no circumstances must any juror yield his or her conscientious judgment. . .
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> . . . .
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> For jurors to have differences, this is quite common. But frequently jurors, after extended discussions, may find that a point of view which

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[3] The date and time of the conference are noted in the "Order" portion of this Decision and Order, *infra*.

[4] State law claims as alleged by Capton were dismissed by prior order of this Court, as were the claims of Plaintiff Willow Woodward.

> originally represents a fair and considered judgment, might well yield upon the basis of argument and upon the facts and the evidence. . . . [T]he key is to listen and consider. I do emphasize, again, that no juror must vote for the verdict unless, after full discussion, consideration of the issues, and exchanges of views, it does represent his or her considered judgment.
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> " . . . [A]lthough a verdict must be the verdict of each individual juror and not more acquiescence in the conclusion of his fellows, yet they should examine the questions submitted with candor and with a proper regard and deference to the opinions of each other . . . ."

(Trial transcript from Feb. 7, 1997, at 3-5 (quoting, in part, *Allen v. United States*, 164 U.S. 492, 501, 17 S. Ct. 154, 41 L. Ed. 528 (1896).) The jury announced that it had reached a verdict a short time after the instruction was given.

In response to a series of questions propounded on a special verdict sheet, the jury concluded the following:

> 1. That Defendant Laurel Sheehan intentionally or recklessly used objectively unreasonable force against Capton in violation of Capton's right to be free from excessive force;
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> 2. that Sheehan had not proven by a preponderance of the evidence that she neither knew nor should have known that her actions were contrary to federal law;
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> 3. that the City of Niagara Falls had a custom, policy, or practice of deliberate indifference to the constitutional right to be free from excessive force because the City failed to supervise its police department;
>
> 3a. that the City's custom, policy, or practice of deliberate indifference was the proximate cause of the deprivation of Capton's right to be free from excessive force;

> 4. that Defendant Zwelling was deliberately indifferent to the constitutional right to be free from excessive force because of his failure to carry out his duty to oversee Defendant Laurel Sheehan;
>
> 4a. that Zwelling's failure to carry out his duty to oversee Laurel Sheehan was a proximate cause of the deprivation of Capton's right to be free from excessive force;
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> 5. that Capton proved by a preponderance of the evidence that she had suffered damages proximately caused by the conduct of Sheehan, the City, and Zwelling;
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> 6. that Capton had proven by a preponderance of the evidence that she is entitled to recover $1 million in actual damages from the City, but none from Sheehan or Zwelling; and
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> 7. that Capton had proven by a preponderance of the evidence that Sheehan and Zwelling had acted with malicious intent to violate Capton's rights or with a callous or reckless disregard of Capton's rights, and that, as a result, Capton is entitled to recover $50,000 each in punitive damages from both Sheehan and Zwelling.

(See Special Verdict Form and Interrogatories (filed on Feb. 7, 1997).). Following the announcement of the verdict, this Court polled the jury and each juror announced in open court that he or she agreed with the verdict.

A few minutes after the verdict, counsel representing the City and Zwelling were approached by one of the jurors, who expressed second thoughts about the verdict. (Maloney Aff. § 8.) The juror later gave a sworn statement in which he stated that he agreed to the verdict to "escape the pressure and duress of the situation." (Maloney Aff. Ex. A at 4.) In response to a question from his attorney, that same juror responded affirmatively that this Court's supplemental

charge made him feel compelled to agree with the other jury members. (*Id.* at 6.)

A number of the other jurors responded to their fellow juror's sworn statement in an affidavit given to the Plaintiff a few weeks after the verdict. (*See* Collins Aff. Ex. B.) Those jurors, four in all, stated in the affidavit that the juror complaining about the supplemental charge had, in fact, indicated that this Court's final instruction "cleared up his mind," and that "he wished [this Court]) had made this statement . . . before." (*Id.* § 11.) Those same jurors added that no juror was ever made to feel pressured or coerced and that every juror had been given the opportunity to voice his or her opinion and speak freely without interruption throughout the deliberation process. (*See generally id.*)

DISCUSSION

A. Defendants' Post-Verdict Motions

Defendants have moved for judgment as a matter of law or, in the alternative, for a new trial. This Court begins with the standard used to assess requests for both forms of relief.

1. Standard Under Federal Rules of Civil Procedure 50 and 59

It is well established that the standard for granting a motion for judgment as a matter of law pursuant to Rule 50(b) is a strict one.[5] *See Stubbs v. Dudley*, 849 F.2d 83, 85

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[5] The term "motion for judgment as a matter of law" is now used in place of a request for "judgment notwithstanding the verdict" (or "judgment n.o.v."), or for a "directed verdict". *See* Fed. R. Civ. P. 50 & advisory committee's note, 1991 amendment; *see also Doctor's Assocs., Inc. v. Weible*, 92 F.3d 108, 111 (2d Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 767, 136 L. Ed. 2d 713 (1997). Rule 50(b) is invoked whom a party seeks judgment as a matter of law after the action has been

(Footnote Continued)

(2d. Cir. 1988), *cert. denied*, 489 U.S. 1034, 109 S. Ct. 1095, 103 L. Ed. 2d 230 (1989). The Second Circuit has recognized that such a motion should only be granted where there is a complete absence of evidence supporting the verdict such that the jury's findings could only have been the result of sheer surmise and conjecture or there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair-minded persons could not arrive at a verdict against him. *See Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1046 (2d Cir. 1992). Thus, a motion for judgment as a matter of law should be granted only if, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable persons would reach. *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970). In making the determination of whether defendants are able to meet this high standard, this Court must draw all reasonable inferences in favor of plaintiff, the nonmoving party, and all questions of credibility must likewise be decided in plaintiff's favor. *Konik v. Champlain Volley Physicians Hosp. Med. Ctr.*, 733 F.2d 1007, 1013 (2d Cir.), *cert. denied*, 469 U.S. 884, 105 S. Ct. 253, 83 L. Ed. 2d 190 (1984).

On the other hand, the standard for granting a motion for new trial pursuant to Rule 59 is less strict because such a motion may be granted even where there is substantial evidence to support the verdict. *Datskow v. Teledyne Continental Motors Aircraft Prods.*, 826 F. Supp. 677, 683 (W.D.N.Y. 1993). The Second Circuit has approved of the following standard for deciding motions for a new trial pursuant to Rule 59:

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submitted to the finder of fact (the old "judgment notwithstanding the verdict" or "judgment n.o.v."). *See* 92 F.3d at 111.

Despite the change in terminology, the standard for granting or denying a motion for judgment as a matter of law made after jury has returned its verdict is the same standard that applied to a motion for judgment n.o.v. *Id.* (citations omitted).

> the trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise to not.

Bevevino v. Saydjari, 574 F.2d 676, 684 (2d Cir. 1978). Therefore, absent a showing of clear error or manifest injustice, it will generally be appropriate to deny relief pursuant to Rule 59 since litigants should neither be required nor without good cause permitted to relitigate already-decided matters. *International Ore & Fertilizer Corp. v. SGS Control Servs*, 38 F.3d 1279, 1287 (2d Cir. 1994), *cert. denied*, 515 U.S. 1122, 115 S. Ct. 2276, 132 L. Ed. 2d 280 (1995).

Having set forth the applicable standards, this Court shall now address each of the parties specific motions for relief under these rules, beginning with a discussion of the issues raised by all three of the Defendants, and concluding with the requests for relief specific to each of the particular Defendants.

2. Issues Raised By All Defendants

a. The supplemental, *Allen*-type charge was coercive

The Defendants argue that this Court's supplemental charge, given to the jury on February 7, 1997, was improper and that this Court should have granted the Defendants' motion for a mistrial. Specifically, Defendants contend that this Court's supplemental instruction coerced one juror into agreeing with the other members of the jury. They rely on the

sworn statement of the juror in question and the short length of time between the charge and the verdict as proof that the charge had a coercive impact on a holdout juror.

"[N]either the affidavits nor the testimony of jurors are generally admissible to impeach their verdict." *Maher v. Isthmian S.S. Co.*, 253 F.2d 414, 418 (2nd Cir. 1958); *see also United States Football League v. National Football League*, 644 F. Supp. 1040, 1049-50 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2nd Cir. 1988); 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2810, at 105-09 (2d ed. 1995). "A juror may not testify . . . about the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to the verdict or about his mental processes in connection with the verdict." 11 Wright et al., *supra*, § 2810, at 110-11. Justice Lamar wrote so eloquently of the reasons for such a rule over eighty years ago:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. 264, 267-68, 35 S. Ct. 783, 59 L. Ed. 1300 (1915).

This Court will not rely, then, on statements from jurors, made after a unanimous verdict has been announced and agreed to by each separate juror, to impeach the verdict. *See Siwak v. Farley*, 681 F. Supp. 1034, 1037 n.2 (W.D.N.Y., 1988). Allowing a juror's second thoughts to cast doubt on the validity of the jury's verdict is a dangerous practice. It can only lead to a battle of sworn statements and affidavits each time one juror expresses doubts about his or her decision. The verdict will not be set aside, nor will a new trial be ordered, on the basis of the sworn statement of the juror who expressed regret over the outcome.

Moreover, even were this Court inclined in this case to rely on the sworn statement of the regretful juror, it would not be sufficient to demonstrate that this Court gave its supplemental charge in error. "Decisions whether and when to give an Allen charge are within the discretion of the trial court." *Vichare v. AMBAC Inc.*, 106 F.3d 457, 462 (2nd Cir. 1996). The Second Circuit has repeatedly and consistently approved of the use of an *Allen* charge to "encourage a verdict in the face of an apparent deadlock." *United States v. Ruggiero*, 928 F.2d 1289, 1299 (2d Cir.) (quoting *United States v. Hynes*, 424 F.2d 754, 757 (2d Cir.), *cert. denied*, 399 U.S. 933, 90 S. Ct. 2270, 26 L. Ed. 2d 804 (1970), and the cases cited therein which have approved of the use of the *Allen* charge), *cert. denied*, 502 U.S. 938, 112 S. Ct. 372, 116 L. Ed. 2d 324, (1991). "The propriety of an *Allen*-type charge depends on whether it tends to coerce undecided jurors into reaching a verdict by abandoning without reason conscientiously held doubts." *United States v. Robinson*, 560 F.2d 507, 517 (2d Cir. 1977) (en banc) (citations omitted), *cert. denied*, 435 U.S. 905, 98 S. Ct. 1451, 55 L. Ed. 2d 496 (1978).

The Defendants suggest that the short interval of time between this Court's final instruction and the return of the verdict is a factor, in addition to the affidavit of the dissatisfied juror, which indicates in this case that the supplemental charge had a coercive impact on the jury. However, "[t]he length of time it takes a jury to reach a

verdict after an *Allen* charge has been delivered is not a factor logically to be considered in determining whether the charge should have been given in the first place." *United States v. Melendez*, 60 F.3d 41, 51 (2nd Cir. 1995); *see also United States v. Hynes*, 424 F.2d 754, 758 (2d Cir.) ("Having consistently affirmed the rationale underlying [an *Allen*] instruction, we cannot logically take into account the fact that it produced quick results . . . in deciding whether or not it should have been given in the first place."), *cert. denied*, 399 U.S. 933, 90 S. Ct. 2270, 26 L. Ed. 2d 804 (1970). Instead, "[t]he appropriate question . . . is whether the district court instructed the jury as to the "necessity on the part of each juror to adhere to his [or her] own judgment." *Melendez*, 60 F.3d at 51 (quoting *Hynes*, 424 F.2d at 758).

This Court's supplemental, *Allen*-type charge cautioned the jurors at least twice that an individual juror should not vote for the verdict unless it represented his or her considered and conscientious judgment. The jurors indicated at the time that the verdict was returned that they were unanimous, and when each individual juror was polled, each stated that they were in agreement with the verdict. This Court cannot conclude, therefore, that the supplemental charge "coerced undecided jurors into reaching a verdict by abandoning without reason conscientiously held doubts." *See Robinson*, 560 F.2d at 517. The post-verdict relief the Defendants seek on the basis of this Court's supplemental charge will not be granted.

b. Failure to provide a negligence charge

Defendants also maintain that this Court should have provided the jury with a charge defining the term "negligence." They claim that the failure to provide such a charge is grounds for a new trial. Defendants are referring to a request from the jury, made in the fifth note addressed to this Court, in which the foreperson wrote: "In the charge both intentional and reckless have been defined . . . However, negligent was not defined. We feel that we need a definition

of negligent or negligence . . ." (Note #5 from jury, dated 2/4/97 at 1:05 p.m.)

At the time that this Court received the note from the jury requesting a definition of "negligence," the attorneys were summoned to the courtroom to discuss the jury's request. This Court then informed the attorneys that it was inclined to give the jury a definition of "negligence," but that it wanted commentary from the attorneys on whether or not the charge should be given. (Collins Aff. Ex. C at 3-5 (transcript of conference with counsel).) At that point, all three counsel — for the Plaintiff, for Defendant Sheehan, and for Defendants Niagara Falls and Zwelling — objected to this Court giving a charge on "negligence." (*See id.* at 6-12.) After lengthy discussions on the issue, defense counsel reluctantly withdrew their opposition to the charge, and counsel for the Plaintiff noted his exception to the charge on the record. (*See id.* at 15.)

Following a brief recess, during which time this Court reflected on the arguments counsel had voiced against a "negligence" charge, this Court returned and informed counsel and the jury that there would be no instruction provided an the term "negligence." (*See id.* at 15-17.) The jurors were then informed that they had at their disposal all of the definitions necessary to determine state of mind. When the jury was excused, this Court discussed the decision not to give the charge with counsel, and counsel for Defendant Sheehan asked this Court to re-read to the jury those portions of the original charge defining "intentional" and "reckless." (*See id.* at 20-21.) This Court declined to re-read portions of the charge. No attorney voiced any objection to this Court's decision not to define "negligence."

Federal Rule of Civil Procedure 51 provides that "[no party may assign as error the giving or failure to give an instruction [to the jury] unless that party objects thereto . . . stating distinctly the matter objected to and the grounds of the objection." This applies to supplemental charges as well, given (or not given) after the deliberations have commenced,

but before the verdict has been returned. *See Porter v. American Export Lines, Inc.*, 387 F.2d 409, 412 (3rd Cir. 1968) (citing *Macartney v. Compagnie Generale Transatlantique*, 253 F.2d 529 (9th Cir. 1958)); *Figge Auto Co. v. Taylor*, 325 F.2d 899, 906-07 (8th Cir. 1964); *Nimrod v. Sylvester*, 369 F.2d 870, 872-73 & nn.7-8 (1st Cir. 1966); *Capital Transit Co. v. Howard*, 196 F.2d 593, 595-96 (D.C. Cir. 1952); *see also Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 262 (5th Cir. 1985); *United States v. Polack*, 442 F.2d 446, 448 & n.3 (3rd Cir.), *cert. denied*, 403 U.S. 931, 91 S. Ct. 2253, 29 L. Ed. 2d 710 (1971). Defense counsel's failure to request a "negligence" charge after this Court decided not to give one, and their failure to object to this Court's decision not to so charge, thus prevents them from arguing that failure to give such a charge constituted error.

Furthermore, this Court's failure to provide the jury with a negligence charge was not erroneous. The jury had been given the definitions of the terms "intentional' and "reckless" in the original charge. They "were instructed that Plaintiff had to prove that a Defendant or Defendants acted with either of those two states of mind before that Defendant or Defendants could be held liable. Thus, if they had concluded that a Defendant did not act "intentionally" or "recklessly," but instead acted with some other state of mind, i.e., negligence, then the instructions clearly informed them that they should find in favor of that Defendant. Since the charge as stated did not "mislead[] the jury as to the correct legal standard," nor did it fail to adequately inform the jury on the law, it was not erroneous. *Anderson v. Branen*, 17 F.3d 552, 556 (2nd Cir. 1994). The Defendants requests for post-verdict relief an the basis of this Court's failure to provide a definition of "negligence" will be denied.

3. Requests for Relief Specific to Each Defendant

In addition to the areas discussed above, to which all Defendants objected, there are a number of particular objections that were voiced by the each individual Defendant.

a. Defendant City of Niagara Falls

i. Inconsistent Verdict

The City argues that it is entitled to a new trial because the damages verdict is inconsistent. Specifically, Niagara Falls is referring to the jury's determination that the City is liable for $1 million in compensatory damages while the individual Defendants (Sheehan and Zwelling) are not. Niagara Falls maintains that a municipality cannot inflict damages in an action brought pursuant to 42 U.S.C. § 1983 unless it does so through individual actors.

Plaintiff brought her claim against the City and Zwelling on the basis of *Monell v. Department of Social Serv.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). *Monell* claims which allege excessive force against a municipality or a supervising officer, like the City of Niagara Falls and Zwelling, require proof that the city had a practice or custom of deliberate indifference to the constitutional rights of those with whom officers of the city police department come in contact.

To prove deliberate indifference in this case, Capton had to show that the municipal policy makers knew to a moral certainty that officers on the Niagara Falls Police Department would confront situations like the one they confronted on August 18, 1994, when they took Barbara Capton into custody. Further, Capton had to prove that situations like the one the officers faced with the Plaintiff present officers with a difficult choice of the sort which supervision will make less difficult or that there is a history of officers mishandling the

situation, and that the wrong choice in situations like one the officers faced on August 18, 1994, will frequently cause the deprivation of the rights of those with whom Niagara Falls Police Department officers may come in contact. Mrs. Capton also had to show that any inadequate supervision by the City of Niagara Falls or Police Chief Zwelling was the proximate cause of any specific violation of Barbara Capton's rights and, by extension, the cause of her injuries.

Monell defendants cannot be hold liable on the basis of respondent superior liability. *See* 436 U.S. at 691. To the contrary, a municipal entity can only be held accountable on a *Monell* claim when that entity had a policy or custom which itself was a proximate cause of the constitutional injury. Niagara Falls could not be held liable for the constitutional deprivation inflicted by its employee, Defendant Sheehan, unless the City itself bore some direct blame for that injury. Thus, in a *Monell* claim like the one which Plaintiff alleged against the City of Niagara Falls, it is entirely possible that a finder of fact could conclude that the City's custom, policy, or practice was more directly related to Plaintiff's compensable injuries than were the actions of the individual actors. Put differently, the individual actors could have been viewed by the jurors as the conduit through which the City inflicted the compensable damages upon Plaintiff. Under that theory of the case, which is the theory presented by Capton in this action, the jury's compensatory damages award is not impermissibly inconsistent. *See Block v. Stephens*, 662 F.2d 181, 187 (3d Cir. 1981) (affirming damages award in a *Monell* case where $500 in compensatory damages was awarded against the police officer who was found to have directly violated plaintiffs' constitutional right to be free from excessive force, while $20,000 in compensatory damages was awarded against the municipality whose policy was a proximate cause of the police officer's use of excessive force), *cert. denied*, 455 U.S. 1008, 102 S. Ct. 1646, 71 L. Ed. 2d 876 (1982).

ii. Character Evidence Improperly Excluded

The City has also moved for a new trial on the basis of this Court's exclusion of a certificate of conviction. Before trial, Plaintiff moved in limine to exclude proof that Capton had been convicted of obstruction of governmental administration for her actions on the day when she was arrested and ultimately injured. This Court granted Plaintiff's motion and proof of the conviction was excluded at trial on the basis that it was extremely prejudicial, had little relevance, and constituted impermissible character evidence. The City asks this Court to revisit the issue because, it is argued, Plaintiff's presentation of evidence of her civic good deeds opened the door to proof on the conviction since Plaintiff had then placed her character at issue.

As stated at the time that this Court first ruled on the motion to exclude, the certificate of conviction itself is hearsay which does not fall within the exception provided by Rule 803. *See* Fed. R. Evid. 803(22). As for testimonial or other forms of proof that Capton had been convicted, such proof had the potential for extreme unfair prejudice, and would have caused the jury to become preoccupied with Capton's character rather than with the issue of whether or not Defendant Sheehan used appropriate force on the day in question. Any probative value the conviction might have had in placing the totality of the events on August 18, 1994, in context was substantially outweighed by the danger that the jury might assume that Plaintiff Capton was acting exactly as the Defendants suggested, simply because she had been found guilty of the misdemeanor.

True, the Plaintiff did elicit some testimony from her witnesses on her civic activities before and after the accident. But that proof was not offered to suggest that Capton's arrest was motivated by ill-will or malice by any of the Niagara Falls Police Officers. Nor was it so extensive that it would have led to the inference that Capton's character was so positive that she must have been improperly arrested on August 18, 1994. To the contrary, the inquiry was confined

to allow proof on those activities as they related to her damages. Proof on Plaintiff's activities prior to and after her contact with the Niagara Falls Police Department was extremely relevant to the issue of her damages. For that reason, this Court allowed Plaintiff to examine on those activities, to a limited extent. Despite the admission of proof on Capton's activities, the decision to exclude proof on Capton's conviction was not erroneous, and the City's request for a new trial on the basis of that decision will be denied.

iii. No Reasonable Finder of Fact Could Have Found the City Liable

Niagara Falls claims that Plaintiff failed to meet her burden of proof with respect to the *Monell* claim against the City, and that no reasonable finder of fact could have found the City liable, entitling the Defendant to judgment as a matter of law. However, Plaintiff's proof, when viewed in light of the standards which govern the Defendant's motions, could have led the rational finder of fact to conclude that the City is liable for the violation of Capton's right to be free from excessive force.

Plaintiff's proof on the *Monell* claim included evidence offered through Defendant Police Chief Zwelling, who testified on the policies and procedures of the City of Niagara Falls in investigating claims filed against the police department. In addition, counsel for the Plaintiff questioned Chief Zwelling on the prior claims filed against the City of Niagara Falls or the Niagara Falls Police Department, and how those claims and complaints were handled by the appropriate municipal actors. Chief Zwelling admitted that he had responsibility for establishing a supervisory policy for the department. He further conceded that when officers make a wrong choice in assessing the amount of force needed to restrain individuals in custody, it will frequently cause the deprivation of the rights of those with whom the officers come in contact.

The proof Plaintiff presented through the testimony of Dr. McCauley could also lead a reasonable jury to infer that the City of Niagara Falls, and Police Chief Zwelling, had a policy which was crafted to pay lip service to a national standard. He asserted that the City of Niagara Falls and Chief Zwelling had a written policy which was little more than a restatement of the law on excessive force, without guidelines for handling Form 16 complaints like those the Plaintiff presented to show indifference. Dr. McCauley's statements and opinions could also lead a rational jury to conclude that the City's written policy was woefully inadequate because it served as a restatement of the law without articulating what is acceptable conduct from officers who come in contact with the citizens they protect. He told the jury that the City's policy fails to state what the proper procedural steps are to address citizen claims and complaints and carry out an investigation, when one is warranted. A reasonable jury could also take Dr. McCauley's words as proof that the City's and Police Chief's policy improperly left total discretion to investigate police misconduct to the department itself, and to one individual, the Police Chief, with no standards for officers in the field investigating those complaints. Finally, Dr. McCauley's testimony could lead competent finders of fact to connect the policy to the conclusion that an appearance of thoroughness is intended to mask a custom or practice of systematic inaction.

The testimony counsel for the Plaintiff elicited from Defendant Sheehan on her awareness of prior claims filed, when viewed in the light most favorable to the non-movant, made the necessary causal connection between the custom or policy of deliberate indifference and the actual violation of Barbara Capton's constitutional rights on August 18, 1994. The medical testimony from Capton's treating physicians and Plaintiff's medical expert tied any violation of her rights to the injuries and damages she has suffered. Since Capton has presented proof which could lead a reasonable jury to conclude that she has proven all the elements of her *Monell*

claim, this Court will deny the City's motion for judgment as a matter of law.

b. Defendant Sheehan

i. Punitive Damages Verdict Should be Set Aside

Sheehan argues in her motion papers that the punitive damages verdict should be set aside for two reasons: first, that there was insufficient proof that her conduct was motivated by evil motive or intent, nor that it involved reckless or callous indifference to Barbara Capton's rights; and second, that the jury's verdict is impermissibly inconsistent because it assessed punitive damages but no compensatory damages against her.[6]

To prove that Sheehan was liable for punitive damages, Capton had to first establish that her right to be free from excessive force was violated by Sheehan. In order to prove that claim, Capton had to show that Sheehan was acting under color of state law, that Sheehan's conduct intentionally or recklessly deprived Plaintiff of her rights under the Fourth Amendment, and that Sheehan's acts were a proximate cause of Capton's injuries and consequent damages. For the jury to find that Officer Sheehan used excessive force in violation of the Fourth Amendment, Capton had to demonstrate that the force Sheehan used was more than the force that a reasonable officer faced with similar circumstances would have employed.

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[6] In her motion papers, Sheehan argued both grounds. However, at oral argument on May 5, 1997, counsel for Sheehan conceded the lack of merit to the argument that the punitive damages verdict was impermissibly inconsistent and should therefore be set aside. This Court will therefore only briefly address Sheehan's second ground in the discussion *infra*.

Capton herself, as well as her treating physicians, the medical experts, and jail matron Wozniak, all testified to facts which, when viewed in a light most favorable to the Plaintiff, would lead a rational juror to find that Sheehan intentionally or recklessly used excessive force on Mrs. Capton on August 18, 1994, causing injury to Mrs. Capton. The medical personnel who were questioned by counsel for the Plaintiff stated that Capton's aneurysm could have burst under the pressure of a choke hold like the one Plaintiff claims Sheehan used on her in the jail matron's office. The testimony of the Plaintiff's law enforcement expert, Dr. McCauley, when evaluated in the context of those witnesses who appeared before him, supports the position that the force Sheehan used was more than that which a reasonable officer faced with Capton's conduct on August 18, 1994, would have employed.

Since Capton presented sufficient proof for the jury to conclude that Sheehan had violated Plaintiff's right to be free from the use excessive force by Sheehan, the jury next had to consider the issue of punitive damages. In order for punitive damages to have been appropriately assessed by the jury, the Plaintiff had to prove by a preponderance of the evidence that Sheehan acted with malicious intent to violate Capton's right to be free from excessive force, or that Sheehan acted with callous or reckless disregard of Capton's rights. The proof at trial included testimony that Sheehan grabbed Plaintiff by the throat and pushed her down forcefully into a chair, and that she did so while addressing Capton in an angry tone of voice. There was also evidence offered by the Plaintiff which confirmed that at the time Sheehan choked Capton, Plaintiff was handcuffed, unarmed, was not trying to escape, and posed no risk of harm to any individual in the jail matron's office. The jury saw Capton and heard testimony that she was a somewhat frail sixty-eight year old woman at the time that Sheehan grabbed her by the neck. All of these facts, taken together, provided sufficient proof for the jury to have returned a punitive damages award against Defendant Sheehan.

Sheehan had also contended in her motion papers that the award of punitive damages but no compensatory damages against her was inconsistent. She has since abandoned that position, *see supra* note 6. This Court therefore sees little need to discuss Defendant's argument, except to note that the jury charge included an instruction that the jury could award punitive damages against a Defendant even if the Plaintiff failed to establish entitlement to actual damages from that Defendant, and the special verdict form allowed that result as well. Neither that portion of the punitive damages charge nor that question on the special verdict sheet drew an objection from defense counsel. Accordingly, Sheehan could not now allege error. *See* Discussion at Part A.3.2.b., *supra*; *see also King v. Mocri*, 993 F.2d 294, 297-98 (2nd Cir. 1993).

c. Defendant Zwelling

i. Jury's Verdict Not Supported by the Evidence

Defendant Zwelling argues that the Plaintiff failed to present sufficient proof that he "knew to a 'moral certainty'" that police officers would confront situations like the one Defendant Sheehan faced with Capton on August 18, 1994. He further maintains that the proof failed to show that situations like the one which confronted Officer Sheehan presents a difficult choice of the sort that supervision will make less difficult, or that there was a history of officers mishandling those situations. (*See* Maloney Aff. § 4A., B.)

As mentioned in the Discussion at Part A.3.a.iii, *supra*, Plaintiff's proof included testimony from Zwelling himself. Zwelling admitted that he was aware that his officers would confront situations in which they would have to assess the need for the use of force against those whom the Niagara Falls police had arrested and were holding in custody. Dr. McCauley's testimony confirmed that police officers make frequent assessments of the need for the use of force against persons in custody. Furthermore, Zwelling also conceded that when officers make a wrong choice in assessing the amount

of force needed to restrain individuals in custody, it will frequently cause the deprivation of the rights of those with whom the officers come in contact. Dr. McCauley confirmed that supervision and training will make a difference in the manner in which police officers assess the need for the use force against those in their custody.

Counsel for Defendant Zwelling suggests that the proof Plaintiff presented on notices of claim filed against the City — which were brought to Zwelling's attention as Police Chief — were only related to the use of force during the arrest process, and were not related to the force used against those who were in the booking process. But Plaintiff's proof was aimed at addressing Zwelling's policies on the permissible use of force at all stages of the custodial spectrum, and not merely at the instant when someone is placed under "arrest." Since Capton presented proof which, when viewed in its most favorable light, established the elements of her claim against Zwelling, this Court will not grant Zwelling's motion for judgement as a matter of law with respect to the jury's determination that Zwelling was liable for the deprivation of Capton's right to be free from excessive force.

ii. Punitive Damages Verdict Not Supported by the Evidence

While Plaintiff clearly presented sufficient proof under the Rule 50 standards to defeat Zwelling's motion attacking the liability verdict, Defendant's motion attacking the punitive damages verdict is a much closer call. As stated in the discussion on Defendant Sheehan's motion, in order to prevail, Plaintiff had to present proof which could demonstrate that Zwelling acted with malicious intent to violate Capton's right to be free from excessive force, or that he acted with a callous or reckless disregard of Capton's rights.

The proof presented at trial has been summarized to a certain extent in this Court's discussion *supra*. While that proof provided a clear basis for a reasonable finder of fact to conclude that Zwelling was liable for the deprivation of Capton's rights, there was an overwhelming amount of evidence to show that Zwelling had no malicious intent, nor that he acted with a callous or reckless disregard of Plaintiff's rights. The proof showed that Zwelling knew to a "moral certainty" that his officers would confront situations like that which they confronted with Capton on the night in question, and that therefore Zwelling was deliberately indifferent. It did not show, however, that his indifference, as demonstrated by his failure to adequately supervise Defendant Sheehan and the officers Zwelling supervised, was the product of his malicious intent or his callous or reckless disregard. At most, it can be attributed to ill-advised policy making or Zwelling's shortcomings in overseeing the use of force by the officers he supervised, rather than to conduct or omissions worthy of the labels "callous" or "reckless." Even drawing all reasonable inferences in the Plaintiff's favor, this Court concludes that the overwhelming evidence favors Zwelling on the issue of punitive damages. Accordingly, Zwelling's motion for judgment as a matter of law with respect to the issue of punitive damages will be granted.

B. Plaintiff's Motion for Attorney's Fees and Cost

Plaintiff is entitled to reasonable attorney's fees and costs as a prevailing party under 42 U.S.C. § 1988, *see Williams v. New York City Hous. Auth.*, 975 F. Supp. 317, 319 (S.D.N.Y. 1997), and Defendants do not dispute Capton's entitlement to fees and costs in this case. Defendants do, however, challenge certain aspects of Plaintiff's request for attorney's fees and costs.

The assessment of the "reasonableness" of a party's request for attorney's fees begins with a determination of the "lodestar amount," which is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate for attorneys and paralegals. *See Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir.1992), cert. denied, 506 U.S. 1053, 113 S. Ct. 978, 122 L. Ed. 2d 132 (1993). There is a strong presumption that the lodestar amount constitutes a reasonable fee, and the party that contests the lodestar amount bears the burden of proving that a departure from the amount is warranted. *Williams*, 975 F. Supp. at 320 (citing *Grant*, 973 F.2d at 101).

The Defendants in this case have contested certain types of charges included in Plaintiff's lodestar amount. All of the Defendants contest Plaintiff's inclusion of billed time for efforts by Plaintiff's counsel aimed at responding to the media. The City generally disputes the hourly rate listed by Plaintiff's counsel, which the City contends is unreasonably high. The City also disputes charges by Plaintiff's counsel for his attendance at Plaintiff's criminal trial, for his travel time, for time charged for counsel's preparation and response to the post-verdict motions, and for the inclusion of fees owed as a result of services rendered by secretaries and paralegals. In addition, the City claims that Plaintiff's counsel has listed excessive amounts for examinations before trial of police witnesses, for research, for trial preparation, and for expert witness fees and expenses. Defendant Sheehan challenges one of counsel's charges related to an April 12, 1995, deed transfer.

Rather than dissect Plaintiff's lodestar amount piece-by-piece in this Decision and Order, this Court prefers instead to conference with counsel to work towards a resolution of the issue, after the parties have had time to review the rulings on the motions for post-verdict relief. Accordingly, this Court will set a date for a subsequent appearance in the "Order" portion, *infra*.

CONCLUSION

The Defendants' motions for post-verdict relief will be denied, except that Defendant Zwelling's Rule 50 motion for judgment as a matter of law with respect to the punitive damages verdict against him will be granted.

Plaintiff's motion for attorney's fees and costs will be granted, and the exact amount of those fees will be determined following a conference with the parties as specified in the "Order" section, *infra*.

ORDER

IT HEREBY-IS ORDERED, that Defendant Sheehan's and Defendants City of Niagara Falls and Zwelling's motions to seal are GRANTED.

FURTHER, that Defendants City of Niagara Falls and Sheehan's motions for judgment as a matter of law or, in the alternative, for a new trial, are DENIED.

FURTHER, that Defendant Zwelling's motion for judgment as a matter of law is GRANTED with respect to the issue of punitive damages, and Defendant Zwelling's motion for judgment as a matter of law or, in the alternative, for a new trial, is DENIED in all other respects.

FURTHER, that Plaintiff's motion for attorney's fees is GRANTED, with the amount to be ordered following a conference with the parties on December 22, 1997, at 9:00 a.m. in Part IV, United States Courthouse, 68 Court Street, Buffalo, New York.

SO ORDERED.

Dated: December 5, 1997
Buffalo, Now York

/s/ William M. Skretny

WILLIAM M. SKRETNY
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON and
DR. WILLOW WOODWARD,

Plaintiffs,

v.

CITY OF NIAGARA FALLS,
NEW YORK, et al.

Defendants.

Filed
1997 Feb. 11
PM 4:36

95-CV-149S

DECISION
AND
ORDER

William M. Skretny
District Judge

INTRODUCTION

Trial began in this case on the morning of January 14, 1997. At final pretrial conferences on January 10 and 13, 1997, this Court responded to three issues the parties had raised or issues which had remained in need of resolution prior to the start of trial. Those issues included the Plaintiffs' arguments on the Defendants, Motion in Limine with respect to claims filed by persons other than Barbara Capton against Defendant Sheehan. The second issue involved this Court's exercise of supplemental jurisdiction pursuant to 28 U.S.C. § 1367. The viability of Plaintiff Woodward's claim constituted the third and final issue. This Court issued a ruling from the bench on

each of these three issues at the January 13, 1997 pretrial conference. This Decision and Order will provide the parties with a more detailed ruling on those issues.

This Court will admit proof of the prior claims with the names of the officers involved redacted from the claims and complaints. This Court will not exercise supplemental jurisdiction over the Plaintiffs' state law claims. Finally, this Court will extend the denial of supplemental jurisdiction to include Woodward's claim as well. The rationale behind each of those determinations will be explained in the discussion which follows.

FACTS

Capton and Woodward have alleged that the Defendants are responsible for injuries they have suffered as a result of the use of excessive force by Defendant Sheehan against Capton on August 18, 1994, when Capton was in the arrestive custody of the Niagara Falls Police Department. They filed their action seeking relief pursuant to 42 U.S.C. § 1983 and New York state tort law.

At a pretrial conference on January 10, 1997, this Court and the parties discussed the Defendants' position, taken in their pretrial submissions, that Woodward does not have a cognizable cause of action as stated in the Complaint ("Compl."). In response to the question of whether or not Woodward's claim is indeed viable, this Court directed counsel for the Plaintiffs to file a submission on the following Monday, January 13, which would explain the Plaintiffs' position on whether or not Woodward's claim is cognizable.[1] Counsel for the Plaintiffs filed that submission ("Pl. Aff.") on January 13, 1997.

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[1] This Court also directed counsel for the Plaintiffs to submit a new copy of the Complaint which would delete those claims which had been *(Footnote Continued)*

At that same January 10 pretrial conference, this Court ruled on the parties motions in limine. Included among those motions was the request of the Defendants to exclude evidence of prior claims filed against Niagara Falls Police Department Officers, including claims against Sheehan. The Defendants were seeking to preclude, in particular, evidence of a prior lawsuit filed against Sheehan which alleged excessive force and for which Sheehan was ultimately found to have been liable. This Court ruled that the Plaintiffs would be permitted to offer the complaint from that prior case along with evidence of prior claims filed against the City of Niagara Falls for alleged police misconduct, but that the names of any individual officers, including Sheehan, would be redacted.

At the final status conference before trial on January 13, 1997, the Plaintiff asked that this Court re-examine the ruling made on January 10 on the motions in limine. The Plaintiffs argued that they needed to present proof of the validity of the claims, and oral testimony of the prior claims, including specific reference to Sheehan. They presented their arguments orally at the conference and in the previously mentioned affidavit on Woodward's claim.

The January 13 conference also involved some discussion of the state law claims and the nature of those claims in relation to the federal constitutional causes of action.

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dismissed from the case up to that point. That new version of the Complaint was submitted as directed. References to the "Complaint" in this Decision and Order are references to the original Complaint filed in this action.

DISCUSSION

A. RE-EXAMINED MOTION IN LIMINE

The Plaintiffs have taken the position that this Court should re-examine its ruling on the prior claims and complaints of excessive force and police misconduct which were lodged against Sheehan. They want to present proof to the jury that at least one prior claim was adjudicated against Sheehan with the result that she was found to be liable for the use of excessive force. They also want the jury to hear proof that other individuals had filed claims and complaints against Sheehan before the incident involving Barbara Capton which forms the basis of this law suit. The Plaintiffs maintain that they cannot prove their state law negligence claims against the City of Niagara Falls and Officer Zwelling without such proof. (*See* Pl. Aff. ¶¶ 9-10.) They have also stated that they will be unable to prove their *Monell*[2] claim without proof of the validity of the claims on the record. (*See* id. ¶¶ 10-11.) At the January 13 pretrial conference, the Plaintiffs cited *Fiacco v. City of Rensselaer*, 783 F.2d 319, 328 (2d Cir. 1986), *cert. denied*, 480 U.S. 922, 107 S. Ct. 1384, 94 L. Ed. 2d 698 (1987) and portions of Schwartz & Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* (2d ed. 1991), to support their position.

The Defendants have consistently argued that proof of the prior claims is highly prejudicial. Defendant Sheehan has pointed to the extreme prejudice she would suffer if proof of prior unrelated claims were admitted in the Plaintiffs' case against her. All of the Defendants oppose the Plaintiffs'

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[2] *Monell v. Department of Social Serv.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The Plaintiffs' § 1983 claim against Police Chief Zwelling and the City of Niagara Falls is derived from the Supreme Court's decision in *Monell*. For convenience sake, the claim against both of those Defendants will henceforth be termed the "Monell" claim.

attempts to have this Court modify its rulings with respect to prior claims.

This Court's original ruling on the motions in limine was the result of a careful examination of the balance necessary to allow the Plaintiffs to prove their case with relevant evidence and to allow the individual Defendants, particularly Sheehan, to contest their liability without the added burden of substantial and unfair prejudice. Throughout the development of this case, whether contemplating trifurcation motions, indemnification issues, or evidentiary questions, this Court has done its best to keep the danger of unfair prejudice to those individual Defendants at bay while allowing the Plaintiffs to prove their *Monell* claim. As this Court has stated on many of those occasions, the nature of the *Monell* claim necessarily implicates proof which will pose some threat of substantial prejudice to individual Defendants. While the task of striking the appropriate balance has been difficult, it is not impossible. If it were, the claim against the individual Defendants would have been bifurcated from the claim against the municipal Defendants.

This Court, as have others before it, decided not to separate those claims. The Plaintiffs opposed the motion to separate those claims with full knowledge of the evidentiary issues which would follow. Ever since this Court elected to try the liability of the individual Defendants for their conduct on August 18, 1994 alongside the action alleging a municipal policy or custom of deliberate indifference over a period of time spanning many years, the struggle has been to strike the aforementioned balance. The ruling on the Defendants' motions in limine was designed with that balance in mind, and it will stand, because it still represents the best way to allow probative evidence with a minimum of unfair prejudice.

The very sources cited by the Plaintiffs at the January 13 pretrial conference contradict the view that the validity of prior complaints is an essential showing for a *Monell* plaintiff. *See, e.g., Fiacco* 783 F.2d at 328. In *Fiacco*, the

jury was instructed to disregard any concerns for the truth or falsity of the complaints themselves, and focus on the sufficiency of the steps taken to respond to claims, regardless of their validity. 783 F.2d at 328. In fact, the Second Circuit noted with approval the district court's repeated instructions on the limited purpose for which the prior claims were admitted and the efforts the trial court took to prevent the jury from knowing or considering whether the allegations in the prior claims had any truth. *See id.* All of this information shows that the Plaintiffs can more than adequately prove their *Monell* claim with proof of notice of the prior claims and without any evidence on the truth or falsity of the allegations contained in those other complaints.

Since the Plaintiffs need not show that prior claims filed against the municipal Defendants had any merit, and since the danger of unfair prejudice is best avoided by this Court's ruling in limine, the Plaintiff's motion is denied and the ruling in limine stands.

B. STATE LAW CLAIMS

At the pretrial conference on January 13, 1997, this Court addressed the Plaintiffs' failure to include substantial portions of their state law claims in the proposed special verdict form they submitted. Counsel for the Plaintiffs indicated that this had been a mere oversight, but it gave this Court the opportunity to explore the potential problems in having the jury address New York State tort claims at the same time as they would be assessing the § 1983 claims.

The Plaintiffs' state law claims are based upon New York tort law. The Plaintiffs have alleged claims against the Defendants for battery and negligent supervision.[3] (*See*

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[3] The Plaintiffs' unlawful arrest claim, (*see* Compl. ¶¶ 24-25), was dismissed by stipulation of the parties. Woodward's state law claim is discussed in Part C, *infra*.

Compl. ¶¶ 27, 29, 32, 34.) They also assert that the municipal Defendants are liable under a theory of respondeat superior for the negligent acts of their employees. (*See id.* ¶ 34.)

A district court's exercise of supplemental jurisdiction over state law claims is guided by the principle that pendent jurisdiction is a doctrine of discretion, and not of plaintiff's right. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); *Canaan Ministries, Inc. v. Town of Cheektowaga*, No. 93-CV-658(E)(F), 1994 WL 584707, at *3 (W.D.N.Y. Oct. 20, 1994). Even where state claims are "so related to claims in the action ... that they form part of the same case or controversy," a district court may decline to exercise supplemental jurisdiction over those claims for four reasons. *See* 28 U.S.C. § 1367(a), (c). The statute provides:

> The district courts may decline to exercise supplemental jurisdiction . . . if —
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Id. The likelihood of jury confusion in hearing both state and federal claims side-by- side can be a sufficiently compelling reason under the fourth basis for declining jurisdiction. *Padilla v. City of Saginaw*, 867 F. Supp. 1309, 1315 (E.D. Mich. 1994); *see Gibbs*, 383 U.S. at 727.

In the present case, there is an extremely high likelihood that a jury would be confused by a charge which instructs them on both the federal and state law claims. The Plaintiffs'

excessive force claim under the Fourth Amendment requires the jury to determine whether the Defendants' conduct was "objectively unreasonable," *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), while the state law intentional tort claim asks the jury to probe the subjective state of mind of the Defendants. *See Martin v. Locicero*, No. 93-CV-419H, 1995 WL 818671, at *3 (W.D.N.Y. Nov. 22, 1995). Merely negligent conduct by the Defendants is an insufficient basis for liability under the § 1983 excessive force action, *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986), but it is the very basis of liability under the negligent supervision and respondeat superior state law claims. In fact, the action alleging respondeat superior liability arising out of the negligent acts of the municipality's employees is at odds with their § 1983 claim against the City of Niagara Falls. *See Monell*, 436 U.S. at 691 (holding that governmental entities may not be held liable under § 1983 on the basis of respondeat superior liability). Furthermore, the negligent supervision claim and respondeat superior action will require the Plaintiffs to present the type of proof against the municipal actors which, as discussed at Part A, *supra*, would be extremely prejudicial against the individual officers contesting their liability under § 1983.

The potential for prejudicial and contradictory proof is not unique to the claims asserted against the municipal actors. Almost every aspect of the Plaintiffs' state law claims would entail the presentation of proof and arguments completely inapposite to the federal claims. Any economical benefit in trying all of these actions in a single court and avoiding duplicative efforts by counsel in two separate actions is outweighed by the high potential for confusion of the issues by the jury. *Cf. Padilla*, 867 F. Supp. at 1316. For that reason, this Court declines to exercise its supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(4).

C. WOODWARD'S CLAIM

Plaintiff Willow Woodward's claim against the Defendants alleges that she has suffered "loss of consortium, loss of companionship, support, services and advice and has suffered great mental anguish and anxiety" from witnessing the Defendants abuse her mother, Plaintiff Barbara Capton, and from seeing her mother "in a state of severe and permanent impairments." (Compl. ¶ 36.) In their pretrial submissions, the Plaintiffs submitted a charge from the New York Pattern Jury Instructions entitled "Damages — Derivative Action Re Spouse — Loss of Services," N.Y. P.J.I. 2:315, which they had modified to fit their claim. The Defendants object to the inclusion of such a charge, arguing that an adult daughter cannot assert a viable derivative action against third parties for the loss of consortium or services of her mother.

In response to the Defendants' arguments, and questions from this Court on the viability of Woodward's claim, counsel for the Plaintiffs concede that the derivative action is not supported by case law. (*See* Pl. Aff. ¶ 6.) They argue instead that a charge on intentional infliction of emotional distress is appropriate. (*See id.* (requesting a charge from N.Y. P.J.I. 3:6).) Because it is clear that any claim Woodward might have will be based on New York law, this Court will decline to exercise its supplemental jurisdiction over Woodward's claim as well.[4]

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[4] At the January 13, 1997 status conference, this Court stated that Woodward's claim would be dismissed for failure to state a cause of action. This dismissal came after the Plaintiffs' concession that the derivative claim was not viable, and after this Court announced that it would not exercise its supplemental jurisdiction over the state law claims.

It would appear that Woodward does not have a viable cause of action, derivative or otherwise. *See, e.g., Mortise v. United States*, 91 0 F. Supp. 74, 76- 78 (N.D.N.Y. 1995), *aff'd*,__ F.3d__ , 1996 WL 734060 (2d Cir. Dec. 24, 1996); *Bovsun v. Sanperi*, 6l-N.Y.2d 219, 232-34, 473

(Footnote Continued)

CONCLUSION

This Court's original rulings on the motions in limine stand, since admitting proof of the prior claims and complaints with the individual officers' names redacted best serves the needs of the Plaintiff to present probative evidence while avoiding the danger of substantial and unfair prejudice to the individual officer Defendants. The Plaintiffs' state law claims, including Woodward's cause of action, are dismissed pursuant to 28 U.S.C. § 1367(c)(4).

ORDERS

IT HEREBY IS ORDERED, that the Plaintiffs' state law claims, as stated in the second, third, fourth, and fifth causes of action alleged in the Complaint, are dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(4).

SO ORDERED.

Dated: January 13, 1997 n.p.t.
Buffalo, New York

/s/ William M. Skretny

WILLIAM M. SKRETNY
United States District Judge

N.Y.S.2d 357, 461 N.E.2d 843 (1984). Rather than dismiss Woodward's claim on the merits, however, and preclude her from bringing a viable claim in state court, if one indeed exists, this Court prefers to let a New York court decide if Woodward has a cognizable cause of action under New York law. For that reason, Woodward's claim is dismissed along with the rest of the Plaintiffs' state law claims.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON, and
DR. WILLOW WOODWARD,

Plaintiffs,

v.

CITY OF NIAGARA FALLS, NEW YORK, NIAGARA FALLS POLICE DEPARTMENT, LAUREL SHEEHAN, ANTHONY CERRITO, THOMAS ZWELLING, and JANE/JOHN DOE(S), as unknown employees of Niagara Falls Police Department,

Defendants.

DECISION AND ORDER

95-CV-149S

INTRODUCTION

Before this Court is the Defendants' Motion to Trifurcate. The Plaintiffs filed their claim seeking damages under 42 U.S.C. § 1983 and state tort law for injuries which allegedly occurred on August 18, 1994, while Plaintiff Capton was in the custody of the Niagara Falls Police Department. The Defendants have asked this Court to try separately the issues of municipal liability, liability of the individual Defendants, and damages, pursuant to Federal Rule of Civil Procedure 42(b).

The Defendants filed with their Motion an accompanying Memorandum of Law in Support ("Defs'. Mem."). The Plaintiffs filed a Memorandum of Law in Opposition to the Motion to Trifurcate ("Pls.' Mem.").[1]

This Court will deny the Motion to Trifurcate for the reasons stated in the discussion that follows.

FACTS

Plaintiffs filed their action [o]n March, 1995, alleging several causes of action against the various Defendants arising out of the arrest and custody of Plaintiff Capton on August 18, 1994. After the close of over a year of discovery, the case was scheduled for trial to commence on January 14, 1997. One month before trial was scheduled to commence, the Defendants filed a number of motions, including a motion for leave to file for summary judgment and the present Motion to Trifurcate.[2]

DISCUSSION

The Defendants have argued that the Plaintiffs' action should be split in three. First, they argue, the issue of the liability of the individuals named as Defendants should be tried. This includes Defendants Sheehan, Zwelling, and John/Jane Doe(s).[3]

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[1] The Plaintiffs titled their memorandum "Memorandum of Law in Opposition to Motion to Bifurcate Trial." Since the memorandum is clearly addressed to the trifurcation motion, this Court reads it as a memorandum in opposition to trifurcation.

[2] The Defendants motion seeking leave to file a summary judgment motion was denied as untimely at the final pretrial conference on December 18, 1996.

[3] At a pretrial conference on December 18, 1996, counsel for the Plaintiff stated on the record that the Plaintiffs had agreed to the

They maintain that a second trial should be used, if necessary, to determine the liability of Defendants City of Niagara Falls ("City") and the Niagara Falls Police Department. The final trial, again, if necessary, would resolve the issue of damages.

In support of their arguments, the Defendants cite to several cases which granted similar motions in § 1983 claims involving municipal and individual defendants. (*See* Defs.' Mem. at 1-3.) They further argue that the claims against the City and the Niagara Falls Police Department, grounded upon *Monell v. Department of Social Serv.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), will entail the presentation of separate evidence which may prove itself prejudicial to the individual Defendants. (Defs.' Mem. at 2.)

The Plaintiffs have taken the position that the action should be tried in one proceeding, and that the motion for trifurcation should be denied. They counter by citing cases and articles which support the proposition that a claim resolved in favor of the individual Defendants will not necessarily preclude a finding against the municipality or the police department. (*See* Pls.' Mem. at 1-9.) The Plaintiffs also discuss the factors a court should consider in considering a motion made pursuant to Rule 42(b), and suggest that those factors in this case militate against trifurcation. (*See id.* at 10-13.) Finally, the Plaintiffs argue that damages are interwoven with the liability claim in an excessive force case such as this one. (*See id.* at 13-15.)

In any case, including a claim of excessive force, the district court is granted broad discretion to decide a motion made pursuant to Rule 42(b). *See, e.g., Milano v. Freed*, 64 F.3d 91, 98 n.7 (2d Cir. 1995); *Katsaros v. Cody*, 744 F.2d 270, 278 (2d Cir.), *cert. denied*, 469 U.S. 1072, 105 S. Ct. 565, 83 L. Ed. 2d 506 (1984); *Carson v. City of Syracuse*, No.

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stipulation that Defendant Anthony Cerrito should be dismissed with prejudice, since the Plaintiffs would not be offering proof of Cerrito's liability.

92-CV-777, 1993 WL 20676, at *2 (N.D.N.Y. July 7, 1993). Rule 42(b) directs that a court may "order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or any separate issue . . . or issues" when separation is "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Fed. R. Civ. P. 42(b). These four factors, convenience, prejudice, expedition, and economy of resources, do not represent a "rigid test for determining whether separate trials are necessary." *Carson*, 1993 WL 20676, at *2. Instead, they guide a court towards the proper exercise of its broad discretion. However, "separate trials in a single action should be the exception, not the rule." *Intellectual Property Dev., Corp. v. UA-Columbia Cablevision*, No. 94 Civ. 6296 (SS), 1995 WL 81276, at *1 (S.D.N.Y. 1995) (citations omitted).

Applying the four factors to the Defendants' Motion, this Court is persuaded to deny separation of the claims and to deny separating liability from damages. There is certainly some prejudice which may flow to Defendants Sheehan and Zwelling when the claims against the municipality are tried alongside the claims against the individual Defendants. The individual Defendants might suffer some prejudice when the Plaintiffs offer proof that the City and the Niagara Falls Police Department ignored numerous other claims of excessive force. However, this Court remains convinced that a strongly worded limiting instruction, and careful regulation of the method of proof, will avoid the type of prejudice which would be so substantial as to justify separating the Defendants into two mini-trials. Counsel for the Plaintiffs has already indicated a willingness to present documentary proof rather than testimonial evidence of the prior claims filed against the municipal Defendants. This Court may employ such methods as redacting the names of the officers in question, and instructing the jury not to draw the inference that proof of the prior claims is evidence that the individual officers in this case used excessive force. These and other safeguards should offset any potential prejudice to the individual officer Defendants.

When you add to those safeguards the benefits in convenience, expedition, and economy of resources, and the avoidance of prejudice to the Plaintiffs, this Court is moved to exercise its discretion in the Plaintiffs' favor in denying separating the Defendants. This Court's trial calendar would make it impossible to try the issue of municipal liability directly after a trial on the individual officers' liability. That second trial would have to take place, if necessary, over seven months after the trial featuring the individual Defendants. *Cf. Carson*, 1993 WL 260676, at *7 (ordering bifurcation of the municipal claims from the individual where the trials will occur "back-to-back" with the same jury to avoid repetition of testimony and financial hardship on the plaintiff). Unlike the *Carson* plaintiff, the Plaintiffs in the present action have prepared up to this point under the assumption that their claims would be tried against all Defendants at once. From discovery through the filing of the final pretrial submissions, the parties have prepared for a unitary trial. The added financial pressure and inconvenience to the Plaintiffs would prove prejudicial to their case, especially given the close proximity to the start of trial. There are numerous out-of-state witnesses who would be forced to testify twice in two separate trials if the Defendants are divided. There is a strong danger of extra inconvenience to this Court and inefficiency if two mini-trials take place to resolve the liability of the Defendants. *See Ricciuti v. New York City Transit Authority*, 796 F. Supp. 84, 86 (S.D.N.Y. 1992) (discussing how bifurcation in a § 1983 action involving municipal and individual defendants might result in a heightened expenditure of judicial resources). Here, the proof with respect to both clusters of Defendants would necessarily overlap, and the rights of the Plaintiffs would be more prejudiced by dividing the liability claims than would the rights of the Defendants. *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 Hastings L.J. 499, 574-78 (1993).

Those same four Rule 42(b) factors weigh even more strongly against dividing the issue of liability and damages. Since the proof on liability would in many respects overlap the proof on damages, there is little prejudice to the Defendants in trying the action all at once. A second trial on punitive damages would necessarily involve much of the same proof as what would be presented in the liability trial. Further, the Plaintiffs may attempt to present damages proof to show the extent of force used on Plaintiff Capton on August 14, 1994. Medical witnesses will undoubtedly offer testimony in the liability phase which may prove relevant to the determination as to how much force is necessary to cause injuries of the sort allegedly suffered by Plaintiff Capton. This same evidence would be repeated at a separate trial on damages. As such, the parties out-of-town experts would have to venture to Buffalo twice if a second trial on damages becomes necessary. This Court, as previously mentioned, would be unable to try the issue of damages, if necessary, until many months after the trial on liability. Trying liability and damages in the same action will prove more convenient, expeditious, and efficient, and less prejudicial, than bifurcating liability and damages.

Having decided that liability and damages will be tried in one action, this Court cautions the Plaintiffs against the presentation of unnecessarily cumulative medical evidence on the issue of Plaintiff Capton's alleged past and future medical expenses. The pretrial submissions of the Plaintiffs list five non-expert medical witnesses who will testify as to Capton's diagnosis and prognosis. Unnecessarily cumulative evidence of damages will not be tolerated, since the presentation of such evidence will bring about the very prejudice to the Defendants that their Motion to Trifurcate fears.

CONCLUSION

The factors this Court is directed to consider by Rule 42(b) lead this Court to deny the Defendants' request for bifurcation of the municipal Defendants from the individual Defendants on the issue of liability. Those same four factors convince this Court to similarly deny the Defendants' motion to bifurcate liability from damages.

Accordingly, the Defendants Motion to Trifurcate is denied.

ORDERS

Whereas, on December 18, 1996, counsel for the Plaintiffs agreed on the record to dismiss the Plaintiffs' claims against Defendant Anthony Cerrito,

Whereas, in the pretrial letter dated November 4, 1996, this Court ordered the parties to prepare proposed special verdict forms, and

Whereas, after careful consideration of the factors which a court is to consider in evaluating a motion made pursuant to Federal Rule of Civil Procedure 42(b),

IT HEREBY IS ORDERED, that the Plaintiffs' claims against Defendant Anthony Cerrito are hereby DISMISSED with prejudice.

FURTHER, that the Defendants Motion to Trifurcate is DENIED.

FURTHER, the parties shall file with the Clerk of the Court and serve proposed special verdict forms, in compliance with this Court's pretrial letter of November 4, 1996, on or before Monday, January 13, 1997, at noon.

FURTHER, that the aforementioned proposed special verdict forms should reflect the structure of the action as established by this Decision and Order.

SO ORDERED.

Dated: January 8, 1997
Buffalo, New York

/s/ William M. Skretny

WILLIAM M. SKRETNY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of May one thousand nine hundred and ninety-nine.

Capton

Appellant — Dkt No: 98-7018

v — Filed

City of Niagara — May 19, 1999

Appellee

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Barbara Capton.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON, Acting Cle

By: /s/ Beth J. Meador [illegible]

Beth J. Meador,
Administrative Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON,
DR. WILLOW WOODWARD,

Plaintiffs,

vs.

CITY OF NIAGARA FALLS, NY,
NIAGARA FALLS POLICE DEPARTMENT,
LAUREL SHEEHAN,
ANTHONY CERRITO,
THOMAS ZWELLING
JANE/JOHN DOE(S) as Unknown Employees,

Defendants.

Case No.
95-CV 149

MOTION TO TRIFURCATE TRIAL

Defendants, City of Niagara Falls, New York, Niagara Falls Police Department, Laurel Sheehan, Anthony Cerrito, Thomas Zwelling, and Jane/John Doe(s), move this Court to trifurcate the trial of this action as to the following:

1) The claims against the City of Niagara Falls, New York and the Niagara Falls Police Department, pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978);

2) Liability as to the other counts; and

3) Plaintiffs' claims of damages.

Trifurcation of the trial will expedite this litigation, decrease costs, result in significant judicial economy and efficiency and promote resolution of the action.

A memorandum of law in support of this motion is attached.

Dated: Niagara Falls, New York
December 6, 1996

Yours, etc.

ROBERT P. MERINO, JR.
Corporation Counsel and
Attorney for Defendants
City of Niagara Falls, New York
By: MICHAEL V. MALONEY
Special Trial Counsel
Office and Post Office Address
City Hall, 745 Main Street
Niagara Falls, NY 14302-0069
Telephone: (716) 286-4420

TO: BOUVIER, O'CONNOR
1400 Main Place Tower
Buffalo, NY 14202-3714

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON,
DR. WILLOW WOODWARD,

Plaintiffs,

vs.

CITY OF NIAGARA FALLS, NY,
NIAGARA FALLS POLICE DEPARTMENT,
LAUREL SHEEHAN,
ANTHONY CERRITO,
THOMAS ZWELLING
JANE/JOHN DOE(S) as Unknown Employees,

Case No.
95-CV 149

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TRIFURCATE TRIAL

Rule 42(b) of the Federal Rules of Civil Procedure provides that "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, ... or of any separate issue". In this matter, trifurcation of Plaintiffs' *Monell* claims, their claims of liability as to the individual Defendants we well as their claims of damages will promote the efficient resolution of this case.

The claims against the municipal Defendants are based upon allegations that the City engaged in a custom, patter or practice of violating the civil rights of citizens. This allegation requires a preliminary finding of liability as to the individual Defendant police officers in violating the rights of these Plaintiffs. *Batista v. Rodriguez*, 702 F.2d 393 (2d Cir.,

1983). Only then may the jury deliberate as to whether the proximate cause of these 10 violations was based upon a custom, pattern or practice of the City of Niagara Falls and/or the Niagara Falls Police Department.

The evidence to be introduced on Plaintiffs' *Monell* claims is distinct from the evidence to be introduced regarding the incident on August 18, 1994. To establish a custom, pattern or practice, Plaintiff must almost conduct a series of mini-trials on prior police complaints/incidents, the discipline imposed and the personnel records, training and experience of the officers involved. This would require a great deal of time to be expended by this Court on a portion of Plaintiffs' claim that may never be reached by the jury.

In *Ricciuti v. New York City Transit Authority*, 796 F.Supp. 84 (S.D. NY 1992), the court granted defendants' motion to separate plaintiffs' Section 1983 claims against the municipal defendants and the claims against individual defendants. While recognizing the possibility that defendants' verdicts as to the claims against the individuals would eliminate the need for a trial against the municipalities, the district court also emphasized the potential conflict of interest and prejudice arising from defenses of immunity and municipal policy between the two groups of defendants. See also, *Myatt v. City of Chicago*, 816 F.Supp. 1259 (N.D. Ill. 1992) (motion to bifurcate trial of plaintiffs Section 1983 claims against individual police officers from the trial of *Monell* claims against City granted).

In the present case, the same issues are presented. Not only to the *Monell* claims asserted by Plaintiffs entail separate evidence but the potential for conflict of interest and prejudice exists. Finally, in the event of a Defendants' verdict on the claims against the individual officers, the trial of the *Monell* claims would not be necessary. Thus, the interests of judicial economy and effectiveness would be served.

Similarly, the issues and evidence involved in Plaintiffs' claims of damages are totally separate from those related to

liability. In fact, proof of the damages claimed will involve complex medical issues requiring considerable expert testimony. The trial of, and verdict upon, liability issues prior to the trial and verdict upon damages will not prejudice any party to the action. Given these circumstances, separating the trial as to Plaintiffs' damages claims will promote judicial economy and efficiency as well as ultimate resolution of this matter. *See e.g., Milano by Milano v. Freed*, 64 F.3d 94 (2d Cir. 1995) (issues of liability and damages bifurcated in complex medical malpractice action).

CONCLUSION

For the foregoing reasons, Defendant's motion to trifurcate the trial of this action should be granted.

Dated: Niagara Falls, New York
December 6, 1996

Yours, etc.

ROBERT P. MERINO, JR.
Corporation Counsel and
Attorney for Defendants
City of Niagara Falls, New York
By: MICHAEL V. MALONEY
Special Trial Counsel
Office and Post Office Address
City Hall, 745 Main Street
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TO: BOUVIER, O'CONNOR
1400 Main Place Tower
Buffalo, NY 14202-3714

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON,
DR. WILLOW WOODWARD,

Plaintiffs,

vs.

CITY OF NIAGARA FALLS, NY,
NIAGARA FALLS POLICE
DEPARTMENT,
LAUREL SHEEHAN,
ANTHONY CERRITO,
THOMAS ZWELLING
JANE/JOHN DOE(S) as
Unknown Employees,

Defendants.

Case No.
95-CV 149

MOTION IN LIMINE

Defendants, City of Niagara Falls, New York, Niagara Falls Police Department, Laurel Sheehan, Anthony Cerrito, Thomas Zwelling and Jane/John Doe(s) as unknown employees, move this court by way of a motion in limine to preclude the following evidence that may be offered at trial on the grounds that said evidence is not relevant under the Federal Rules of Evidence, Rules 402, 403 and 404(b) and is otherwise improper:

A. Evidence of a complaint by Dennis Harris against Defendant Laurel Sheehan of verbal abuse.

B. Evidence concerning a complaint made by Nicholas Cimino against the Defendant Laurel Sheehan on the grounds that said claim is remote in time and of no probative value.

C. Evidence concerning a complaint made by Ms. L.S. Thompson against the Defendant Laurel Sheehan on the grounds that said claim is remote in time and of no probative value.

D. Evidence of a complaint made by Gerald S. Mazur against the Defendant Laurel Sheehan including proposed exhibits 23, 25 and 26.

E. Any complaints made of verbal abuse made against the Defendants or any other police officer.

F. CIU investigation records concerning the complaints in paragraphs A through D.

G. Records of any complaints against officers other than the Defendants Laurel Sheehan and Anthony Cerrito in connection with Plaintffff's claim against them.

H. Suicide prevention screening guideline dated 8/18/94.

I. Those portions of the reports of Dr. Paul McCauley (Exhibit 58) and the report of Dr. Sheldon Marguilies that refers to items or exhibits that are excluded pursuant to this motion.

J. Handwritten diagram of the Jail Matron's office (Exhibit 52).

K. Photographs of Barbara Capton dated 10/26/94.

L. 1994-96 collective bargaining agreement between City of Niagara Fails and Captains and Lieutenants Association (Exhibit 73).

M. Any claims or complaints made more than two (2) years before the incident on August 18, 1994.

N. Any evidence concerning any complaint made that did not involve the use of force while in custody.

O. Any complaint made that was either determined to be without merit by the police department, which was not previously sustained by a court of competent jurisdiction.

P. All notices of claim filed against the City of Niagara Falls.

Q. Any other proposed exhibits submitted by Plaintiff which have not been filed with the Court or provided to the Defendants that when furnished appear to be objectionable.

R. The right to object to any other exhibit at trial for which there is not a proper foundation.

Attached hereto is an affidavit in support of this motion.

Dated: Niagara Falls, New York
December 11, 1996

Yours, etc.

/s/ Michael V. Maloney

ROBERT P. MERINO, JR.
Corporation Counsel and
Attorney for Defendants
City of Niagara Falls, New York
By: MICHAEL V. MALONEY
Special Trial Counsel
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City Hall, 745 Main Street
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Telephone: (716) 286-4420

TO: BOUVIER, O'CONNOR
1400 Main Place Tower
Buffalo, NY 14202-3714

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON,
DR. WILLOW WOODWARD,

Plaintiffs,

vs.

CITY OF NIAGARA FALLS, NY,
NIAGARA FALLS POLICE
DEPARTMENT,
LAUREL SHEEHAN,
ANTHONY CERRITO,
THOMAS ZWELLING
JANE/JOHN DOE(S) as
Unknown Employees,

Defendants.

Case No.
95-CV 149

AFFIRMATION

Michael V. Maloney, being an attorney at law, duly licensed to practice his profession by the State of New York, affirms the following to be true, to wit:

1. That your deponent is Trial Counsel to the City of Niagara Falls in this matter.

2. That this affirmation is submitted in support of the motion in limine brought by the Defendants to preclude certain exhibits and evidence that the Plaintiffs apparently intend to offer at the trial based upon review of their pretrial statement and exhibit list. Your affiant has not yet been furnished with copies of the exhibits.

3. The Plaintiffs have indicated they intend to offer evidence of a complaint of verbal abuse made by Dennis Harris against the Defendant Laurel Sheehan. There is also an

indication that they intend to offer evidence of complaints made by Nicholas Cimino (exhibit 9) and Mrs. L.S. Thompson (exhibit 7) against the Defendant Laurel Sheehan. The complaint by Dennis Harris was dated May 31, 1991, the complaint by Mrs. Thompson was dated September 23, 1991 and the complaint by Nicholas Cimino was dated January 31, 1991. It is submitted to the Court that the Plaintiffs should be precluded from introducing the complaints or offering evidence concerning any of the above complaints for the reason that they are not relevant in that they are remote in time and are not similar acts.

4. The Defendants also request that the complaint made against the Defendant Laurel Sheehan by Gerald S. Mazur be ruled inadmissible. Mr. Mazur, was an off-duty Town of Tonawanda police officer, brought a civil action against Lt. Sheehan. After the trial, a determination was made that there had been a battery (apparently a touching) but the jury awarded no damages and no costs to the complainant Gerald S. Mazur. (A copy of the judgment is hereto annexed as Exhibit A.) It is submitted that this complaint and testimony concerning the same should be excluded for the same reason set forth; namely, that it is remote in time and additionally is not a similar act as provided under Rule 404(b) of the Federal Rules of Evidence. To allow the Plaintiffs to introduce any evidence concerning this complaint, where no damages were awarded to the complainant, would be highly prejudicial to the Defendants in this action.

5. The Defendants are also moving to trifurcate the trial of the Plaintiffs' complaint herein. It has been submitted that the cases against the individual officers should be tried separate from the claims against the municipality. It is, therefore, submitted that with respect to the claims against the individual officers any complaint or testimony concerning any complaint filed by any other officer of the Niagara Fails Police Department should be excluded as being irrelevant and prejudicial to the rights of the Defendants Laurel Sheehan and Anthony Cerrito. The Defendants further request that the proposed exhibits of other complaints filed

against the City of Niagara Falls by way of notice of claim be excluded. Admission of these notices of claim, none of which have been sustained, would be highly prejudicial to the interests of the Defendants, and further is hearsay evidence and should be barred. The Defendants further request that to the extent that the Court grants the Defendants' request to exclude evidence that those portions of the reports of Plaintiffs' expert, Dr. Paul McCauley, and Plaintiff's doctor, Dr. Sheldon Marguilies, that refer to any such excluded evidence be also excluded.

6. The Defendants also request that the suicide prevention screening guidelines (exhibit 3), the prisoner's status report (exhibit 65), the handwritten diagram of the jail matron's office (exhibit 52), and the handwritten messages of Barbara Capton (exhibit 56) be excluded (exhibits 3 and 65) on the grounds that they are irrelevant and would be prejudicial, exhibit 52 on the basis that it is irrelevant and not the best evidence of the size and location of the matron's office.

7. Defendants also request exclusion of the photograph of Barbara Capton dated 10/26/94 on the grounds the same may be highly prejudicial (although said photograph has not been submitted to the Defendants as of yet); the neurological evaluation of Dr. Capruso (exhibit 61) unless there is a proper foundation laid for it through direct testimony.

8. The Defendants also seek to exclude the 1994-96 collective bargaining agreement between the City of Niagara Falls and the Captains and Lieutenants Association (exhibit 73). Such exhibit has no relevancy whatever to any of the claims made by the Plaintiff herein. The only possible purpose of that agreement would be to attempt to show something to the jury that the Plaintiff is not allowed to prove; namely, that there was some indemnification provision or agreement by the City of Niagara Falls with respect to their police officers. This would be highly prejudicial to the case of all of the Defendants, but especially the Defendants Thomas Zwelling and the City of Niagara Falls, New York.

9. The Defendants further seek to exclude any claims of any complaints or incidents that occurred more than two years prior to this incident on August 18, 1994 on the grounds that said incidents or complaints were remote in time and of no probative value.

10. Likewise, the Defendants seek to exclude any evidence of any complaint made that did not involve the use of physical force and further to exclude any complaints relating to the use of physical force that did not occur within custody on the basis that under the provisions of Rule 404(b) of the Federal Rules of Evidence they are not similar acts.

11. The Defendants further seek to have the right to object to any other exhibit not specifically objected to if such exhibit requires a foundation and a proper foundation is not laid during the time of trial.

I affirm the statement of facts set forth above under the penalties of perjury.

Dated: December 12, 1996
Niagara Falls, NY

/s/ Michael V. Maloney

MICHAEL V. MALONEY

VOL. I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON,

Plaintiff,

-vs-

CIV - 95-149S

CITY OF NIAGARA FALLS, et al,

Defendants.

Proceedings held before the Honorable William M. Skretny, Part IV, U.S. Courthouse, 68 Court Street, Buffalo, New York, on January 14, 1997.

APPEARANCES:

GEORGE COLLINS, ESQ.,
Representing the Plaintiff.

MICHAEL MALONEY, ESQ., and
RICHARD ROTELLA, ESQ.,
Representing the City of Niagara Falls and Mr. Zwelling.

PATRICK BROWN, ESQ.,
Representing Laurel Sheehan.

MICHELLE L. JANICKI, RPR,
Official Reporter,
U.S.D.C, W.D.N.Y.

[5]

THE COURT: With respect to the matter that you asked me to reconsider yesterday, Mr. Collins, as to the reference to the Mazur case —

MR. COLLINS: Yes.

THE COURT: — and the issue of deliberate indifference, you asked me to take a look at the Fiacco case and portions of Schwartz and Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees,

[6]

which I have done, and I've reviewed them specifically in light of your argument, and I find that my original decision as to the matter of how to proceed, with the Mazur case materials and others was correct. There is no need to know the ultimate disposition of the claims and complaints, and you were concerned that simply the claims and complaints would require more. They do not need to be connected to individual officers, at least in terms of further identification on the issue of notice to the municipal defendant. I've looked at the Monell case and how that was viewed in terms of the issue before me. In Fiacco the jury was instructed to disregard any concerns for the truth or falsity of the complaints themselves and focus on the sufficiency of the steps taken to respond to claims, regardless of their validity, and that was your concern. That was Fiacco at page 328, cert. denied 480 U.S. 922. Also I point out that the Second Circuit noted with approval the district court's repeated instructions on the limited purpose for which prior claims were admitted and the efforts the trial court took to prevent the jury from knowing or considering whether the allegations in the prior claims had any truth.

What this information shows, Mr. Collins, is that

[7]

it would not be proper, in my view, to permit you to go beyond the matter of the claims themselves and the complaints irrespective of the arguments that you made yesterday.

MR. COLLINS: Thank you.

THE COURT: Okay. All right. We're ready to proceed, finally.

VOL. XII

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON,

Plaintiff,

-vs- 95 - CV-149S

CITY OF NIAGARA FALLS, et al,

Defendants.

Proceedings held before the Honorable William M. Skretny, Part IV, U.S. Courthouse, 68 Court Street, Buffalo, New York, on January 30, 1997.

APPEARANCES:

GEORGE COLLINS, ESQ.,
Representing the Plaintiff.

MICHAEL MALONEY, ESQ., and
RICHARD ROTELLA, ESQ.,
Representing the City of Niagara Falls
and Mr. Zwelling.

PATRICK BROWN, ESQ.,
Representing Laurel Sheehan.

MICHELLE L. JANICKI,
Official Reporter,
U.S.D.C, W.D.N.Y.

Trial Motion by Defendant City of Niagara Falls and its Police Chief, Defendant Thomas Zwelling, for directed verdict.

[2298]

MR. MALONEY: Your Honor, on behalf of both Chief Zwelling and the city of Niagara Falls, I'll also make a motion under Rule 50. I did want to discuss it a bit. As indicated in your charge, there has to be proof that — with respect to Chief Zwelling, that he knew to a — that he knew to moral certitude that the officers of the

[2299]

Niagara Falls Police Department would confront a situation like this. And secondly that it would present a difficult choice, that supervision would make less difficult. I don't think there is any proof in the record whatsoever concerning that second requirement on — with respect to Chief Zwelling. And third, that the wrong choice by police officers in handling the situation will frequently cause a deprivation of the constitutional rights of those whom the police department may come in contact with. There was no testimony during the trial concerning any use of force and none of the complaints submitted had anything to do with any use of force during custody. And therefore, it's my position that with respect to both Chief Zwelling, and to the city of Niagara Falls, there has been a failure of proof and the Court should render a judgment at this point in their favor.

THE COURT: Okay, Mr. Maloney, thank you. With respect to Mr. Brown's motion, as far as Rule 50 is concerned, the rule does call for the fact that a motion under that rule shall specify the judgment sought and the law and facts on which the moving party-s entitled to judgment. Taking the

[2300]

motion as made and considering the response as made, I will deny the motion —

MR. BROWN: Very well, your Honor.

THE COURT: — in keeping with the strict requirement of Rule 50(a)(2). With respect to your motion, Mr. Maloney, it being made in somewhat of a different manner, I will reserve on that motion, and the case will go to the jury in its present posture.

VOL. XII

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON,

Plaintiff,

-vs- 95-CV-149S

CITY OF NIAGARA FALLS, et al,

Defendants.

Proceedings held before the Honorable William M. Skretny, Part IV, U.S. Courthouse, 68 Court Street, Buffalo, New York, on January 30, 1997.

APPEARANCES:

GEORGE COLLINS, ESQ.,
Representing the Plaintiff.

MICHAEL MALONEY, ESQ., and
RICHARD ROTELLA, ESQ.,
Representing the City of Niagara Falls
and Mr. Zwelling.

PATRICK BROWN, ESQ.,
Representing Laurel Sheehan.

Michelle L. Janicki,
Official Reporter,
U.S.D.C, W.D.N.Y.

(Excerpt of Jury Charge)

[2351]

Now, there has been evidence presented to you that claims, Notices of Claims, and complaints regarding police conduct had been made to the Niagara Falls Police Department and the Niagara Falls corporation counsel's office. You should neither assume that the claims were true, nor should you try to assess their truth. You should merely focus your attention on whether the chief of police or the city of Niagara Falls took sufficient steps in their supervisory capacity in handling those matters. I will instruct you the next time that we get into this, on the standard you will use to assess the sufficiency of the steps taken by the chief of police or the city of Niagara Falls in their supervisory capacity in handling those matters.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON, Plaintiff, VS.	Final copy for counsel as completed 2/3/97
CITY OF NIAGARA FALLS, NY, LAUREL SHEEHAN, and THOMAS ZWELLING Defendants.	Special Verdict Form and Interrogatories 95-CV 149S

We, the members of the Jury, return the following verdict in 95-CV-149S:

Verdict 2/7/97 3:15 P.M.

REMEMBER, YOUR ANSWER MUST BE UNANIMOUS BEFORE YOU RECORD AN ANSWER OR ANY PART OF AN ANSWER ON THIS FORM.

1. Did Defendant Laurel Sheehan intentionally or recklessly use objectively unreasonable force against Plaintiff Barbara Capton in violation of Barbara Capton's right to be free from excessive force?

YES

If your answer to question 1 is "yes," proceed to question 2. If your answer to question 1 is "no," proceed no further and notify the Marshall in writing that you have reached a verdict. Make sure the foreperson signs and dates this verdict form.

2. Has Defendant Laurel Sheehan proven by a preponderance of the evidence both that she neither knew nor

should have known that her actions were contrary to federal law?

NO

If your answer to question 2 is "yes," you cannot award Barbara Capton any damages from Defendant Laurel Sheehan. You should nevertheless proceed to question 3 regardless of whether your answer to question 2 is "yes" or "no."

3. Did the Defendant City of Niagara Falls have a custom, policy, or practice of deliberate indifference to the constitutional right to be free from excessive force because of the City's failure to supervise its police department?

YES

If your answer to question 3 is "yes," proceed to question 3(a). If your answer to question 3 is "no," you cannot award Barbara Capton any damages from Defendant City of Niagara Falls. However, if your answer to question 3 is "no," you should nevertheless proceed to question 4.

3(a). Was the City's custom, policy, or practice of deliberate indifference the proximate cause of the deprivation of Plaintiff Barbara Capton's constitutional right to be free from excessive force?

YES

If your answer to question 3(a) is "no," you cannot award Barbara Capton any damages from Defendant City of Niagara Falls. You should nevertheless proceed to question 4 regardless of whether your answer to question 3(a) is "yes" or "no".

4. Was Defendant Police Chief Zwelling deliberately indifferent to the constitutional right to be free from excessive force because of the Police Chief's failure to carry out his duty to oversee Defendant Laurel Sheehan?

YES

If your answer to question 4 is "yes," proceed to question 4(a). If your answer to question 4 is "no," you cannot award Barbara Capton any damages from Defendant Thomas Zwelling. However, if your answer to question 4 is "no," you should nevertheless proceed to question 5.

4(a). Was Police Chief Zwelling's failure to carry out his duty to oversee Laurel Sheehan a proximate cause of the deprivation of Barbara Capton's constitutional right to be free from excessive force?

YES

If your answer to question 4(a) is "no," you cannot award Barbara Capton any damages from Defendant Police Chief Zwelling. You should nevertheless proceed to question 5 regardless of whether your answer to question 4(a) is "yes" or "no".

5. Has Plaintiff Barbara Capton proven by a preponderance of the evidence that she suffered any damages which were proximately caused by the conduct of the following defendants?

Laurel Sheehan	(remember, if you answered "yes" to question 2, do not answer this question as it pertains to Defendant Laurel Sheehan) YES
City of Niagara Falls	(if you answered "no" to either questions 3 or 3(a) as they pertain to Defendant City of Niagara Falls, do not answer this question with respect to City of Niagara Falls) YES

Thomas Zwelling	(if you answered "no" to either questions 4 or 4(a) as they pertain to Defendant Thomas Zwelling, do not answer this question with respect to Thomas Zwelling) YES

If you answered "no" to question 5 for all of the defendants, proceed no further and notify the Marshall in writing that you have reached a verdict. Make sure the foreperson signs and dates this verdict form.

If you answered "yes" to question 5 for any of the defendants, please proceed to question 6. However, if you answered "no" as to any defendant, you cannot award Barbara Capton any damages from that defendant.

6. Has the Plaintiff Barbara Capton proven by a preponderance of the evidence that she is entitled to recover actual damages from any of the following defendants?

Laurel Sheehan	(remember, if you answered "yes" to question 2, or ."no" to question 5 as they pertain to Defendant Laurel Sheehan, do not answer this question with respect to Defendant Laurel Sheehan) NO
City of Niagara Falls	(remember, if you answered "no" to questions 3, 3(a), or 5 as they pertain to Defendant City of Niagara Falls, do not answer this question with respect to the City of Niagara Falls) YES

Thomas Zwelling (remember, if you answered "no" to questions 4, 4(a), or 5 as they pertain to Defendant Thomas Zwelling, do not answer this question with respect to Thomas Zwelling)

NO

If you answered "yes" to question 6 for any of the defendants, please proceed to question 6(a). If you answered "no" to question 6 for all of the defendants, please proceed to question 7.

6(a). What amount of actual damages has Plaintiff Barbara Capton proven by a preponderance of the evidence were proximately caused by each of those defendants?

Total actual damages $ 1,000,000

Laurel Sheehan	$ 0
City of Niagara Falls	$ 1,000,000
Thomas Zwelling	$ 0

Proceed to question 7.

7. Has Plaintiff Barbara Capton proven by a preponderance of the evidence that any of the following defendants acted with malicious intent to violate Barbara Capton's rights or with a callous or reckless disregard of Barbara Capton's rights?

Laurel Sheehan (remember, if you answered "yes" to question 2, or "no" to question 5, as they pertain to Defendant Laurel Sheehan, do not answer this question with respect to Defendant Laurel Sheehan)

YES

Thomas Zwelling	(remember, if you answered "no" to questions 4, 4(a), or 5 as they pertain to Defendant Thomas Zwelling, do not answer this question with respect to Thomas Zwelling)
	YES

If you answered "no" to question 7 for both defendants, proceed no further and notify the Marshall in writing that you have reached a verdict. Make sure the foreperson signs and dates this verdict form.

If you answered "yes" to question 7 for either or both of the defendants, proceed to question 7(a). If you answered "no" for either defendant, you cannot answer question 7(a) with respect to that defendant.

7(a). What amount of punitive damages do you find that Plaintiff Barbara Capton has proven she is entitled to from each of the following defendants?

Laurel Sheehan	(remember, if you answered "now or were instructed not to answer question 7 as it pertains to Defendant Laurel Sheehan, you cannot answer this question)
	$ 50,000.00
Thomas Zwelling	(remember, if you answered "no" or were instructed not to answer question 7 as it pertains to Defendant Thomas Zwelling, you cannot answer this question)
	$ 50,000.00
Total punitive damages	$ 100,000.00

When you have completed this Special Verdict Form as instructed, sign and date this form below and notify the Marshal outside your door, in writing, that you have reached a unanimous verdict and are ready to return to the courtroom.

Remember that each and every answer on this verdict sheet must be unanimous before it is recorded on this verdict form.

Dated: February 7, 1997
Buffalo, New York

s/
FOREPERSON

UNITED STATES DISTRICT COURT

BARBARA CAPTON,

Plaintiff,

v

CITY OF NIAGARA FALLS, NEW YORK, LAUREL SHEEHAN, and THOMAS ZWELLING

Defendants.

Filed 97 Feb 14 AM 9:44 U.S. District Court - Buffalo

Second Amended Judgment in a Civil Case

Case Number: 95-CV 149 S(H)

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial xxxxx before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Barbara Capton is awarded damages of ONE MILLION dollars from the city of Niagara Falls; and Barbara Capton is also awarded punitive damages from Laurel Sheehan in the amount of FIFTY THOUSAND dollars and FIFTY THOUSAND dollars from Thomas Zwelling for punitive damages also.

Pursuant to the Decision and Order filed on February 11 1997, it is Ordered that the plaintiff's state law claims, as stated in the second, third, fourth and fifth causes of action alleged in the Complaint, are DISMISSED without prejudice pursuant to 28 U S C § 1367(c)(4).

February 14, 1997
Date

/s/ Rodney C. Early
Clerk

/s/ Denise L. Collie
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON,

Plaintiff,

vs.

Case No.

CITY OF NIAGARA FALLS, NY, LAUREL SHEEHAN, and THOMAS ZWELLING

95-CV 149

Defendants.

MOTION FOR JUDGMENT AS A MATTER OF LAW AND/OR MOTION FOR A NEW TRIAL

Defendants, City of Niagara Falls, New York and Thomas Zwelling hereby move this Court pursuant to the provisions of Rule 50 and Rule 59 for the following relief:

1. Granting the motion previously made by the Defendants City of Niagara Falls, New York and Thomas Zwelling at the end of the Plaintiff's case (on which motion the Court reserved decision), granting the Defendants City of Niagara Falls, New York and Thomas Zwelling judgment as a matter of law pursuant to Rule 50 of the Rules of Civil Procedure.

2. Renewing the motion made during trial for judgment as a matter of law pursuant to Rule 50 and moving for judgment at the close of the trial as a matter of law on the basis that no reasonable jury could have entered judgment for the Plaintiff in this matter as against the Defendants City of Niagara Falls, New York and Thomas Zwelling.

3. Granting a new trial pursuant to Rule 59 on the basis that the verdict returned by the jury in this matter was inconsistent with its findings and with the general verdict returned by it.

4. In the alternative, granting a new trial pursuant to Rule 59 of the Rules of Civil Procedure on the basis that the *Allen* charge given to the jury was coercive and had the effect of compelling a verdict.

5. For such other and further relief as to this Court may seem proper.

Attached hereto is an affidavit in support of this motion, together with a transcript of testimony taken from Marshall E. Banty, a juror in this matter.

Dated: February 19, 1997
Niagara Falls, NY

/s/ Michael V. Maloney
ROBERT P. MERINO, JR.
Corporation Counsel and
Attorney for Defendants
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TO: BOUVIER, O'CONNOR
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1400 Main Place Tower
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LOTEMPIO & BROWN
PATRICK J. BROWN, ESQ.
181 Franklin Street
Buffalo, NY 14202

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON,

Plaintiff,

vs.

Case No.

CITY OF NIAGARA FALLS, NY, LAUREL SHEEHAN, and THOMAS ZWELLING

95-CV 149

Defendants.

AFFIRMATION IN SUPPORT OF MOTION

Michael V. Maloney, being an attorney at law, duly licensed to practice his profession by the State of New York, affirms the following to be true, to wit:

1. That he is Trial Counsel to the Defendant City of Niagara Falls and Defendant Thomas Zwelling in the above action and submits this affirmation in support of a motion being made for judgment as a matter of law pursuant to the provisions of Rule 50 of the Rules of Civil Procedure or, in the alternative, for a new trial pursuant to the provisions of Rule 59 of the Rules of Civil Procedure.

2. At the conclusion of the Plaintiff's case, your affiant made a motion for judgment as a matter of law on behalf of the Defendant City of Niagara Falls and the Defendant Thomas Zwelling on the basis that with respect to the Defendant Thomas Zwelling, the Plaintiff had introduced no evidence whatsoever relating to any use of excessive force during the booking process and with respect to the City of Niagara Falls had introduced insufficient evidence from which a reasonable jury could find a policy or custom or practice upon which a judgment against the Defendant City of Niagara Falls could be based.

3. The Defendants at this time request the Court to rule on the motion made during trial upon which it reserved, and further renew said motion at the end of the case and request judgment in favor of the said Defendants as a matter of law pursuant to Rule 50.

* * * *

CITY OF NIAGARA FALLS

6. The City of Niagara Falls also moved for judgment pursuant to Rule 50 during the trial. It is submitted to the Court that there was no evidence introduced from which the jury could have found that there was a policy or custom of tolerating excessive force during the booking process, which is when Plaintiff's claimed injury occurred. The evidence introduced by the Plaintiff showed there were five claims related to claimed use of force between 1991 and the day of the incident. There were a number of notices of claim claiming a use of force, which were slightly less than 20 which were investigated and handled by the Law Department. None of these notices of claim, related to any claim of any use of force during the booking process. There was no evidence introduced that showed a difficult choice relating to the booking process, nor is there a history of officers mishandling the situation during the booking process as is required by Charges 40, 41 and 42 and by the case of *Walker vs. City of New York*, 974 F2d 293.

It is therefore submitted that the motion of the Defendant City of Niagara Falls for judgment as a matter of law should be granted.

* * * *

All of which is respectfully submitted.

Dated: February 19, 1997
Niagara Falls, NY

/s/ Michael V. Maloney
MICHAEL V. MALONEY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BARBARA CAPTON,

Plaintiff,

vs.

Case No.

CITY OF NIAGARA FALLS, NEW YORK, LAUREL SHEEHAN, and THOMAS ZWELLING

95-CV 149

Defendants.

MEMORANDUM OF LAW

ISSUES PRESENTED

This Memorandum is submitted in support of the motions made by Defendants City of Niagara Falls, New York and Thomas Zwelling at the close of Plaintiff's case and after the verdict pursuant to Federal Rules of Civil Procedure 50 and 59.

The grounds for relief sought, as appear more fully from these Defendants moving papers are the failure of Plaintiff to meet its burden of proof on the issues of custom/usage, causation, and deliberate indifference; the inconsistency of the verdict; the nullification of a juror's vote on grounds of surrender of conscientious conviction; the absence of a definition of negligence after request by the jury; and an inappropriate award of punitive damages.

* * * *

I. THE PLAINTIFF FAILED TO MEET ITS BURDEN OF PROOF WITH RESPECT TO ITS CLAIMS AGAINST THE DEFENDANT CITY OF NIAGARA FALLS, AND THE DEFENDANT THOMAS ZWELLING.

* * * *

B. BALD ALLEGATIONS, WITHOUT MORE, ARE INSUFFICIENT TO DEMONSTRATE §1983 LIABILITY.

Significantly, although admitted into evidence, the evidence of prior complaints/claims alone cannot be dispositive. The quality and quantity of evidence required to sustain a §1983 complaint against a municipality, and the analysis related thereto, is found in *Carter v. District of Columbia*, 795 F2d 116 (DC Cir., 1986). In that case, arrestees attempted to establish a custom/practice of police misconduct attributable to a course pursued by official policymakers that resulted in the claimed deprivation of constitutional rights. In analyzing the issues on appeal, the Court commented as follows:

> "Plaintiffs urge us to include and consider . . . their complaints, pleadings, and press clippings, *unsubstantiated by testimony*, concerning alleged incidents of the use of excessive force by police officers. As the District Court recognized, these hearsay items could show no more than notice to the city that allegations had been made." *Id.* at 123 [Emphasis added.]

The Court went on to "cull out" those items as failing to show actual, as distinguished from merely alleged, occurrences. *Id.* at 123. The Court then summarized the plaintiffs' testimonial proof of actual occurrences to the following:

1. *Testimony* of a witness that police officers beat him repeatedly both at the scene of his arrest and after taking him into custody;

2. *Testimony* that the death of a prisoner in police custody and the medical examiner's conclusion that the death was caused by a "choke hold" administered by police officers;

3. *Testimony* that the death of seven persons, acknowledged by the police chief, in incidents involving the DC Police in a two month period;

4. *Testimony* that a fine imposed against an officer for striking two persons without cause, and improperly arresting one of them;

5. *Testimony* that the reprimand of an officer for looping a belt around the neck of a prisoner and taunting him; and

6. The police chief's *admission* that an officer had kicked a handcuffed suspect. *Id.* at 123.

The Court found the above "disquieting" events *insufficient* to prove a pervasive pattern of police use of excessive force, persisting because of departmental approval. As the Court indicated: "If the evidence plaintiffs presented here were adequate to make out a §1983 case, then practically every large metropolitan police force, it would seem, could be targeted for such liability". *Id.* at 123.

Carter is instructive because of its stark evidentiary contrast with the case at bar. In *Carter*, actual *testimony* on the custom/practice evidence was elicited. The bald complaints, without more, obviously could not then be sufficient to establish a constitutional violation. [In *Gentile v. County of Suffolk, et al.*, 129 F.R.D. 435 (E.D. New York 1990) a report of the Temporary Commission of Investigation was admitted into evidence. However, the Court there cited a number of factors for reliance on it, including, inter alia, the special skill or expertise of the investigators, the due process afforded individuals involved

in **testimonial hearings**, procedural safeguards that were set up and the finality of the findings of the commission.]

Additionally, *Carter* addresses the situation where legal complaints against officers, including the police chief, are referred to the municipality's general counsel and corporation counsel for processing. As the Court remarked: "The personnel and complaint handling procedures brought out at trial may fall some distance from the ideal, but, as the District Court correctly indicated, they do not spell out a deliberate 'see no evil' policy." *Id.* at 124.

Carter cites *Fiacco v. City of Rensselaer*, 789 F2d 319 as the type of case that may provide sufficient evidence to support a complaint of this type, and expressly remarked on the plaintiff there presenting "a *parade of witnesses*, each an excessive force complainant before the police chief himself, each relating firsthand and in detail both the brutal incident and the chief's stock response," *Carter*, *supra*, at 125. In the final analysis, there is no strong record here as is required by *Carter*, *Fiacco*, and the other authorities cited hereinabove that can accurately be said to demonstrate evidence adequate to support the custom/policy predicate.

In the *Fiacco* decision, with respect to the sufficiency of the evidence of a policy of deliberate indifference, the Court specifically looked to the adequacy of the specific allegations of police brutality during the five years before the incident. The Court expressly noted that the plaintiff introduced seven written claims that had been filed, and that the plaintiff had called as witnesses four of the complainants. In addition, the Court recited the name, and summarized the testimony of individuals who were called as witnesses to testify in the trial. Obviously, these witnesses were subjected to cross-examination. Unlike here, claims plus testimony related thereto, plus an opportunity to scrutinize their credibility, were present in the *Fiacco* trial.

In *Spell v. McDaniel*, 824 F2d 1380, the same type of evidentiary analysis was undertaken as in *Fiacco* and *Carter*. In that case, the following factors were considered to arrive at the conclusion that the widespread use of excessive force was known to the police chief who was found to have condoned the practices by deliberate coverup, common disregard, and positive encouragement:

1. Lay witnesses *testified* to a number of observed or directly experienced acts of brutality by city police officers *of the type charged to McDaniel*.

2. A departmental officer *testified* to various incidents involving excessive uses of force which were not punished because of an effective "code of silence" within the department.

3. *Testimony* demonstrated that city police officers were specifically trained in the technique of kneeing or grabbing testicles in order to subdue arrestees or persons in custody.

4. Another officer *testified* to an observed pattern and specific incidents of brutality and excessive uses of force by members of the department and that he had seen new officers being trained in the technique of kneeing persons in the groin and that *McDaniel's* kneeing of *Spell* was consistent with the training that he received in the department.

5. Another officer *testified* that uses of excessive, unwarranted force were condoned by her supervisors, and that when she complained she was forbidden by her superior to interrupt or complain again about such incidents.

6. Another officer, a 25 year veteran of the department, *testified* that a defendant's philosophy as chief of police was to "kick ass and take names".

7. Another officer *testified* that the chief and another defendant condoned the use of excessive force on arrestees.

8. The former legal advisor to the police department *testified* that disciplinary procedures within the department had broken down to the point of being disregarded in many instances.

9. A former Assistant State District Attorney *testified* that he had investigated and successfully prosecuted members of the police department for assault on suspects and that the department condoned and encouraged the use of force to intimidate. (*Id.* at 1393 through 1394)

In the case at the bar, 22 complaints and seven notices of claim over a four year period were presented as evidence of the policy/custom that resulted in an alleged lack of supervision sufficient to reach the level of deliberate indifference. Although Plaintiff, in her pretrial statement, indicated that she would call numerous claimants/complainants, to testify, she called no such witnesses. Accordingly, no testimony was had on the validity of the complaints, and further, no complainant was able to be subjected to cross-examination on the validity of their complaint. Further, Plaintiff produced no other witnesses with first-hand knowledge to testify as to the conduct of the Niagara Falls Police Department. Although listed as witnesses in the pretrial statement, no members of the Niagara Falls Police Department were called by Plaintiff to testify. Consequently, Plaintiff's evidence here consists of solely a series of bald complaints, none of whose validity is established, all of which are unsubstantiated by testimony. If the claimed abuses were so persistent and widespread, Plaintiff should surely have been able to provide substantiation, as in *Fiacco*, *Carter*, and *Spell* to demonstrate it. The proof simply failed.

The argument on the part of the Plaintiff appears to be simply that complaints were filed, therefore a course of conduct arose sufficient to demonstrate deliberate indifference. It is respectfully submitted that, as a matter of law, consistent with *Fiacco*, *Carter* and *Spell* this is insufficient to carry the stringent burden of proof as required by the authorities cited hereinabove, and could open a

Pandora's box of liability that would improperly circumvent the limitations of *Monell*. For example, unscrupulous individuals could have numerous baseless complaints, anonymous or otherwise, filed with the Police Department and, thereafter, claim that constitutional rights were violated. The false complaints, without more, then would set up a predicate for municipal liability.

* * * *

CONCLUSION

As the result of all of the foregoing, the Defendants' City and Zwelling's motion pursuant to FRCP Rule 50, made at the close of Plaintiff's case, and renewed at the close of trial should be granted, or, in the alternative, a mistrial should be declared and a new trial scheduled.

ROBERT P. MERINO, JR., ESQ.
Corporation Counsel and Attorney for
Defendants City of Niagara Falls, New
York and Thomas Zwelling
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No. 99-271

IN THE

Supreme Court of the United States

CITY OF NIAGARA FALLS, NEW YORK, LAUREL SHEEHAN, THOMAS ZWELLING and NIAGARA FALLS POLICE DEPARTMENT,

Petitioners,

v.

BARBARA CAPTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

As detailed below, there is no cause for this Court's review of the Petitioners' position, which has been rejected by the U.S. Court of Appeals for the Second Circuit in its unanimous Summary Order filed March 2, 1999. Moreover, Petitioners' application for a Rehearing and Rehearing *en banc* was denied by the Second Circuit on May 19, 1999.

A. The Court of Appeals properly ruled that prior civil rights violations did not have to be proven in this case.

The Court of Appeals, by affirming the judgment against the City, agreed with the District Court and the jury determination that the City and its police department evidenced a practice and custom of deliberate indifference to Barbara Capton's statutory and constitutional right to be free of police excessive force, through its failure to properly investigate and appropriately discipline instances of alleged excessive force over a number of years.

The Petitioners have mischaracterized the jury verdict, since it did not necessarily find that Mrs. Capton's injuries were proximately caused by Petitioners' custom, policy or practice of deliberate indifference *to the police department's civil rights violations*. The deliberate indifference was to Mrs. Capton's constitutional right to be free of the exercise of excessive force by police. In this particular case, it was claimed on behalf of Mrs. Capton that the Petitioners' custom, policy and/or practice of deliberate indifference was characterized by a lack of any recognizable departmental policy relating to investigating allegations of the use of excessive force. The police department routinely failed to

investigate allegations of excessive force, and there was never one instance of even token discipline resulting from any investigation, purely and simply because investigation was threadbare or non-existent. An official "head in the sand" approach to past allegations of use of excessive force was a predictable precursor of the Capton tragedy.

Despite the lapse of almost three years and two unsuccessful attempts to alter the verdict, Petitioners continue to either misunderstand or misconstrue the Respondent's theory of liability, which has been upheld by the U.S. District Court, the U.S. Court of Appeals and perhaps most importantly, the jury. Petitioners have been held liable for the injuries to Barbara Capton not because "the Respondent could establish the City's deliberate indifference to civil rights violations without proving that any such violation had ever occurred" (see Petitioners' Statement of the Case, p. 5) but because the Respondent established by a preponderance of the evidence that the Petitioners were deliberately indifferent to Mrs. Capton's right to be free of excessive force by so blatantly ignoring their duty to investigate and correct, where necessary, past instances of the use of excessive force by its police officers for more than a decade, as the evidence amply demonstrated.

Respondent's theory of culpability was not necessarily that prior civil rights violations had occurred to which the Petitioners had been deliberately indifferent but that the Petitioners had (a) never bothered to investigate numerous allegations of civil rights violations; or (b) if a rare need rudimentary investigation was conducted, no action ever resulted; and (c) no one was ever disciplined as a result of any substantiated accusation.

As stated by the trial court after reviewing appropriate authorities:

> There is no need to know the ultimate disposition of the claims and complaints. . . . They do not need to be connected to individual officers, at least in terms of further identification on the issue of notice to the municipal defendant. I have looked at the *Monell* case and how that was viewed in terms of the issue before me. In *Fiacco*, the jury was instructed to disregard any concerns for the truth or falsity of the complaints themselves and *focus on the sufficiency of the steps taken to respond to claims, regardless of their validity*. . . . That was *Fiacco* at page 328, *cert. denied* 480 U.S. 922. Also, I point out that the Second Circuit noted with approval the District Court's repeated instructions on the limited purpose for which prior claims were admitted and the efforts the trial court took to prevent the jury from knowing or considering whether the allegations in the prior claims had any truth (Post Trial Decision and Order, A-64).

Petitioners incorrectly state that the City did not seek to entirely exclude proof of past instances of civil rights violations in support of Respondent's deliberate indifference claim. (Petitioners' motion in limine dated December 11, 1996, in paragraph 5 of the affidavit of defense counsel A-57-60).

Petitioners erroneously state that "Barbara Capton did not introduce evidence that any person had ever been injured due to the application of excess force by a member of the

Niagara Falls Police Department". Exhibits 5-23 and 26-28, 30-33, 35, 37-39, 42-45, 47-48, 50, 88 all allege allegations of excessive and unreasonable force, frequently causing fractures, lacerations, head injuries and loss of consciousness, among other things. In particular, Exhibits 26 and 27 (pp. 54-109 in the Exhibit Volume submitted to the Court of Appeals) relate to the Notice of Claim of the police chief's own son, Michael Zwelling, and the resultant investigation into use of excessive force. In that instance, complaints of excessive force against police officers were verified by objective eyewitness statements supplied by eight civilians, who confirmed significant acts of the use of excessive force by police officers. There was, as usual, no determination made of even one solitary act of wrongdoing by any policeman involved, and no corrective measure was taken. There was never any follow-up communication with any complainant. Where invariably nothing was ever done, a clear message was set to officers — there was no restraint on their conduct.

In essence, because Petitioners never made any effort to assess the truth of the allegations contained in virtually all accusations of excessive force, the jurors were instructed by the court not to attempt to assess the truth either, but rather to focus on whether the failure to investigate properly or at all, or to discipline where appropriate, had been established so they could determine whether that constituted a policy of deliberate indifference to Respondent's constitutional rights.

Although the Petitioners correctly point out that the City and Chief Zwelling moved for a directed verdict during trial pursuant to FRCP 50(a), that motion was narrowly based upon Respondent's alleged failure to interpose any "testimony during the trial concerning any use of force and

none of the complaints submitted had anything to do with any use of force *during custody*" (emphasis added A-67).

In its Post-Trial Decision and Order, contrary to Petitioners' interpretation, the District Court did address the issue as to whether there had been sufficient and appropriate proof submitted by Respondent to justify the jury verdict. Like the jury before him, Judge Skretny recognized that (a) the evidence supported the notion that there had been many, many accusations of excessive force made against members of the Niagara Falls Police Department in the past, which the defendant Laurel Sheehan was aware of; (b) the defendant Laurel Sheehan was also aware that no one had ever been disciplined; (c) that a climate which appeared to condone use of excessive force had been permitted to flourish, due to the Department's custom or practice of systematic inaction (Post Trial Decision and Order, A-22-24, A26-27).

Whether any actual prior civil rights violations needed to be established is an issue (a) that has been clearly addressed by the District Court and the Court of Appeals; and (b) is irrelevant based on the Respondent's theory of recovery under Section 1983 and validated by the District Court, the Court of Appeals and the jury.

B. By reinstating the punitive damages award against Police Chief Zwelling, the Court of Appeals properly refused to require the literal personal involvement by supervisors to justify a punitive award under 42 U.S.C. § 1983.

Although the District Court vacated the punitive claim against Chief Thomas Zwelling but upheld the punitive award against Laurel Sheehan, Judge Skretny stated in his Decision

and Order that "defendant's motion attacking the punitive damages verdict (against Zwelling) is a much closer call" (A-27). Contrary to Petitioners' position, the jury instruction relating to punitive damages did *not* contain express language requiring that Chief Zwelling manifest a negative animus towards Barbara Capton personally. The jury was invited to determine if Barbara Capton had proven that any of the defendants had acted with (a) malicious intent to violate her rights; or (b) callous or reckless disregard of her rights (A-75).

Despite the fact that the Court of Appeals bluntly stated that the defendants' appellate arguments did not offer a convincing rationale for the notion that the "deliberate indifference" compensatory standard found by the jury is somehow a lesser standard of culpability than the "callous indifference" punitive standard, Petitioner again seeks to deny justice to Barbara Capton by delaying it unnecessarily.

Petitioners' blatantly ignore the fact that Barbara Capton, a veritable ninety-eight pound model citizen with no arrest record who was handcuffed and was proven to have posed absolutely no risk of harm or escape that morning, was manhandled by Laurel Sheehan as though she presented the persona of a Balkan terrorist.

REASONS FOR DENYING THE WRIT

The petition's fact bound claim that the courts below either violated Supreme Court precedent or disregarded Respondent's evidentiary failures does not warrant review by this Court. The decision below was a plainly correct application of settled law, and no conflict among the circuits is even alleged.

1. Petitioner mistakenly relies on *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). In *Brown*, the Supreme Court had its first confrontation with a Section 1983 municipal liability, deficient hiring claim. The Court's 5-4 decision established strict fault and causation standards for cases in which the plaintiff seeks to establish municipal liability based on the deficient hiring of a constitutional tortfeasor. In these cases, the plaintiff must demonstrate that the hired officer "was highly likely to inflict the 'particular injury suffered by the plaintiff'." 117 S. Ct. at 1392.

In *Brown*, Deputy Burns, after a high speed chase, pointed his gun at the Brown vehicle and ordered Mr. and Mrs. Brown out of the vehicle and to raise their hands. When she did not exit, the Deputy used an arm bar technique, grabbing her arm at the wrist and elbow, pulling her from the vehicle and spinning her to the ground, allegedly causing knee injuries and subsequent surgery. The plaintiff argued that the County should be held liable for the Deputy's use of excessive force because his supervisor, Sheriff Moore, had not closely reviewed the Deputy's driving record and prior criminal history that included driving infractions and misdemeanor convictions for assault and battery, resisting arrest and public drunkenness.

The critical issue in the *Brown* case was whether the Sheriff's failure to effectively screen the record of an applicant for law enforcement employment justified the imposition of Section 1983 liability on the County. The bare majority of this Court held that it did not.

The Petitioners fail to recognize that the plaintiff in *Brown*, unlike Barbara Capton, did not rely upon a persistent

custom or practice but rather asserted that the Sheriff's *single decision* to hire the deputy set the wheels in motion that led to the alleged deprivation of her federally protected rights. The majority found the requisite level of culpability and causation required by Section 1983 to be lacking.

In essence, the decision in *Brown* requires that where a plaintiff relies upon proof of a single instance of inadequate screening to establish liability under Section 1983, that litigant is required to meet a significant and demanding burden of proof of municipal involvement. In a loose sense, every violation of a federally protected right is attributable to the municipality's decision to hire the constitutional wrongdoer. Imposing liability on this basis, however, becomes dangerously close to *respondeat superior* liability. The issue is whether there is a sufficiently direct link between the deficiencies associated with the hiring decision and the violation of the plaintiff's federal rights.

The *Brown* court held that this link is normally far too tenuous in hiring cases, especially in a case involving a single instance of inadequate screening. The court in *Brown* therefore stressed "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee" 520 U.S. at 405 (citing *inter alia*, *City of Canton v. Harris*, 489 U.S. at 391, 109 S. Ct. 1589, 103 L. Ed. 2d 412 (1989)). A 1983 claimant under the *Brown* decision who alleges such a claim shoulders an even more demanding burden of proof than in a training claim, as the court saw important distinctions between hiring and training claims.

In some circumstances, failing to adequately train law enforcement officers about how to handle recurring situations

will predictably cause violations of federally protected rights. The high level of predictability could justify inferences that the specific training deficiency reflected deliberate indifference and directly caused the deprivation of the plaintiff's federally protected rights. A hiring decision is different for the reasons above stated. In *Brown*, it was stated as follows:

> Predicting the consequences of a single hiring decision, even when based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties. . . . The fact that inadequate scrutiny of an applicant's background would make a violation of rights more likely cannot alone give rise to an inference that a policymaker's failure to scrutinize the record of a particular applicant produced a Constitutional violation. After all, a full screening of an applicant's background might reveal no cause for concern at all; if so, a hiring official who failed to scrutinize the applicant's background cannot be said to have consciously disregarded an obvious risk that the officer would subsequently inflict a particular Constitutional injury.

117 S. Ct. at 1392.

Petitioners have seized upon the use of the phrase "a new standard" as discussed by Justice Souter in his dissenting opinion. *Brown*, 520 U.S. at 422. Justice Souter merely opined that the Court's definition of "deliberate

indifference" for hiring claims appears to be even higher than the standard for "reckless" fault in criminal law. The *Brown* case makes clear that inadequate screening claims are far more difficult to prove than inadequate training claims. It has no relevance to a case as dissimilar factually as the present case.

The facts in the *Brown* case are of course markedly distinguishable from the facts in this case where municipal decision makers, including Chief Zwelling, knew or should have known that the custom and practice in the Niagara Falls Police Department, as it related to continual non-investigation of allegations of excessive police force, would fail to prevent improper and tortious conduct by some members of the force. Therein lies the rub, and thereby is established the reckless conscious disregard for the consequences of their action, in other words, the "deliberate indifference" necessary to trigger municipal liability. *See Brown*, 520 U.S. at 407, citing *City of Canton*, 489 U.S. at 390, n.10.

What Petitioners seem unable to grasp is that Respondent's allegations of unconstitutional activity do not have to flow from prior acts of excessive force adjudicated to be such. The unconstitutional activity or deliberate indifference to Respondent's constitutional rights flows from the repeated and willful failure of the Niagara Falls Police Department and its policymakers to either investigate or discipline properly, or in many instances at all, the multiple allegations of excessive force against its police. The proof at trial adduced that this custom and practice existed over a period of many years, and that Laurel Sheehan knew it. As a result, she enjoyed *carte blanche* insofar as her treatment of arrestees was concerned, and the official *laissez faire* attitude bred abuse.

If the Petitioners' argument is advanced to its logical conclusion, then police departments like that in Niagara Falls would be effectively insulated from excessive force claims by way of a systemic, institutional failure to investigate and document any underlying claims, thereby making it all but impossible for an injured claimant to establish prior specific constitutional violations.

City of Canton held that a municipal policy giving rise to liability under Section 1983 may be inferred even when the policymaker has failed to act affirmatively, so long as a need to control the agents of the municipality "is so obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been deliberately indifferent to the need". *City of Canton*, 109 S. Ct. at 1205.

Petitioners likewise ignore the thrust of *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) where this Court stated that a municipality may be held liable for acts taken pursuant to a "policy" by inference from the decisions or non-decisions of those officials whose acts may fairly be said to be those of the municipality. There is no dispute that Chief Zwelling possessed the power to conduct a thorough internal investigation in order to determine the validity of complaints and claims and impose an appropriate penalty whenever warranted.

In *Fiacco v. City of Rensselaer, et al.*, 783 F.2d 319 (2d Cir. 1986), *cert. denied*, 480 U.S. 922, 107 S. Ct. 1384, 94 L. Ed. 2d 698 (1987), the Second Circuit determined that the trial court correctly ruled that the claim under Section 1983 that a plaintiff's injuries resulted from a municipal policy of non-supervision of its police officers was a

legitimate jury question under the Federal Statute. To the same effect, *see Vann v. City of New York*, 73 F.3d 1040 (2d Cir. 1995).

In *Fiacco*, the Second Circuit stated at 783 F.2d 326:

> First, Fiacco's theory is not that the City intended to engage in intentional conduct. Rather it is that the City was knowingly and deliberately indifferent to the possibility that its police officers were wont to use excessive force and that this indifference was demonstrated by the failure of the City defendants to exercise reasonable care in investigating claims of police brutality in order to supervise the officers in the proper use of force. We see no logical flaw in such a hypothesis, and we reject the notion advanced by the City defendants that a municipality may not be held liable under Section 1983 on the basis of a policy of deliberate indifference to the constitutional rights of persons within its domain.

The Court then stated further, at 783 F.2d 327:

> A municipality that has the responsibility to keep order and to protect the rights of those within its boundaries to be free from physical violence gives the policemen considerable power to subdue persons who would violate those rights. It cannot responsibly condone police officers' use of that power in a way that is itself lawless. It should not take a *laissez-faire* attitude toward the violation by its police officers of the very rights that they are supposed to prevent others from violating. A

> principle that would give a municipality immunity from Section 1983 liability for injury caused by its deliberate indifference to the police officers' use of excessive force in violation of constitutional principles would foster the denial — both by policemen and by civilians — of the very rights the City is responsible for safeguarding.

2. The jury was instructed that to establish a claim under Section 1983, the plaintiff must show that the defendants acted intentionally or recklessly (Special verdict form and interrogatories A-71-77). The jury was instructed that punitive damages were appropriate if they found the defendant acted with reckless disregard of the plaintiff's rights. The instant case presents a situation with a standard for compensatory liability that is as high as the usual threshold for an award of punitive damages. In *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1985), the Supreme Court stated that "in torts like malicious prosecution that require a particular anti-social state of mind, a proper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages". *Smith* at 461 U.S. 53. The underlying standard for both compensatory damages and punitive damages is a recklessness and a callousness which was found by the jury to be present.

The *Smith* court pointed out, however, that even though there was no substantial difference between the standards for liability in such claims for punitive and compensatory damages, punitive damages are not equally available and are never awarded as a matter of right. The claimant not only has to meet the threshold showings of callousness and/or

recklessness, but also must merit in the jury's eyes a separate discretionary moral judgment. *Id.* at p. 51. "To put it differently, society has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for lesser degrees of fault". *Id.* at pp. 54-55.

There is clearly no societal interest served in shielding the exercise of a police chief's discretion when the use of that discretion results in reckless or callous indifference to the rights and safety of those in custody. *Id.* at p. 55. *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 616 (1981).

Under common law as expressed in the Restatement of Torts, Second, actual intent was not required for punitive damages. A claimant under Section 1983 should not have a more restrictive and imposing burden.

In *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991), it was observed that the standard for compensatory damages overlaps liability for punitive damages to the extent that both require a finding of reckless or callous disregard or indifference to the complainant's constitutional rights. As in *Larez*, it was apparently impossible for a police officer in the Niagara Falls Police Department to suffer discipline as a result of a complaint logged by a citizen, and that the Police Department's disciplinary and complaint practice contributed to the use of excessive force because the procedures made clear to officers that even in the presence of independent third-party witnesses, they could get away with anything.

As stated by the First Circuit Court of Appeals in *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989), *cert.*

denied, 493 U.S. 820, 110 S. Ct. 75 (1990), which upheld the jury's imposition of punitive damages against the Mayor and Police Chief,

> an unbridled use of force was an almost certain consequence of a police department that acquiesced in unconstitutional arrest practices and had a policy which provided no training or guidelines on the modern standards governing arrest or the use of force, inadequate training of its command officers and supervisor of its inferior officers, and little or no discipline of police misconduct.

(871 F.2d at 1163).

Contrary to Petitioners' "statement of facts" in its petition (A-15), the jury was *not* instructed that a punitive award required that heightened wrongful conduct be particularly directed at Barbara Capton. The Second Circuit rightfully corrected the District Court in recognizing that the compensatory damages standard of "deliberate indifference" is no less blameworthy or culpable than the "callous indifference" required in punitive damages. The Court of Appeals recognized that even though Chief Zwelling was not physically involved in the assault upon Barbara Capton, his involvement was deeper and more persuasive. His "head in the sand" approach to one of his most important administrative functions, policing the police, created the atmosphere that resulted in the assault that fateful morning. As such, he was a vital accomplice to Laurel Sheehan's brutality.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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